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The Application of the Nonmarket Economy Rule under the United States' Antidumping Law

미국의 대중국에 대한 비시장경제지위 적용 및 사례연구

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The Application of the Nonmarket Economy Rule under the United States' Antidumping Law

by

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A thesis submitted in conformity with the requirements for
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ABSTRACT

The Application of the Nonmarket Economy Rule under the United States' Antidumping Law

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Despite the expiration of a key provision in China's WTO Accession Protocol, it is questionable whether there is any legal justification for the enforcement of WTO members to grant market economy status to China. In order to understand the Nonmarket Economy (NME) treatment issue, it is important to analyze both the legal and administrative frameworks designed specifically for the nonmarket economies of WTO Members. Since the United States is a frequent user of antidumping sanctions against China, the implications of this practice will obviously be significant for China. However, rather than focusing on the origins and evolutionary process of nonmarket economy provisions, this paper seeks to analyze both the legal and administrative implications of nonmarket economy provisions, based on case studies of dumping investigations initiated by the United States against Chinese imports between 1980 to 2016. This paper argues that there are three intrinsic problems specifically applied to nonmarket economy

cases. First, the lack of clear, multilaterally agreed definition of a nonmarket economy country has led the WTO importing country to have wide discretion on determining a nonmarket economy country and will continue to cause problem even after China's nonmarket economy status has expired. Second, the United States adopts a methodology that grants market economy treatment to Chinese exporters while the evidence suggests that they are almost impractical in reality. Last, Chinese respondents have been resorting to the separate rates test in order to avoid receiving a country-wide dumping margin, but subsequent administrative hurdles have been intricately designed and implemented to negatively affect the antidumping investigation procedure. Therefore, the benefits of graduating from nonmarket economy status may not be so great for China in light of the associated burdens.

Keywords: Nonmarket Economy, Antidumping Law, China's WTO Accession Protocol
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TABLE OF CONTENTS

LIST OF TABLES

Chapter 1. Introduction

1.1. Research Question

The recent global recession and the spread of protectionism in major economies present a gloomy outlook across the world. It is not surprising that the last few decades have seen an increase in non-tariff barriers, in contrast with the declared ambitions of multilateral trading negotiations. Due to the present stalemate in multilateral negotiations, governments have instead turned to temporary instruments to protect their domestic industries amid a deteriorating economic situation. Antidumping, countervailing and safeguard mechanisms allow a country to impose temporary duties on goods exported from a foreign exporter providing certain legal conditions are met. Amongst such non-tariff barriers, antidumping laws are the most frequently adopted national policy instruments by both developed and developing countries.[1] Within the United States and members of the European Union, in particular, more cases have been filed under antidumping statutes than under all other trade statutes combined.[2] Thus, this relatively new aspect of trade protectionism, in the form of antidumping law, requires close scrutiny.

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[1] World Trade Organization (WTO), "Statistics on Antidumping," accessed November 11, 2017, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

[2] Thomas Prusa and Susan Skeath, "Modern Commercial Policy: Managed Trade or Retaliation?," *Handbook of International Economics 2,* 2005, p.358.

Over the last few decades, antidumping investigations have primarily targeted China.[3] The historical users of antidumping – Australia, Canada, the European Union and the United States – as well as relative "newcomers" – e.g. Argentina, Brazil, India, Mexico, South Africa and Turkey – are also frequently targeting China with antidumping.[4] China has gradually shifted its position from a defensive user of antidumping sanctions to a more active user since its accession to the World Trade Organization (WTO) in December 2001.[5] For instance, Table 1 lists disputes that China has raised related to antidumping measures enacted against it by its major trading partners, largely against the United States (US) and the European Union (EU), via the WTO Dispute Settlement, which mainly concerns issues on interpretation of Nonmarket Economy (NME) treatment and application of NME-specific antidumping calculating methodologies by specific countries.

Table 1. WTO Cases Involving China as Complainant[6]

Case name	Dispute Number	Covered Agreement
European Union - Measures Related to Price Comparison Methodologies	DS516	Accession, AD, GATT
United States - Measures Related to Price Comparison Methodologies	DS515	Accession, AD, GATT, WTO

[3] Between 1995 to 2016, China ranked the first place as the most frequent target of antidumping initiations by exporting countries followed by Republic of Korea, and United States. *See* WTO, "Anti-dumping Measures: By Exporting Country 01/01-1995-31/12/2016," accessed November 11, 2017, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.
[4] Chad Bown, "China's WTO Entry: antidumping, safeguards, and dispute settlement," In *China's Growing Role in World Trade*, University of Chicago Press, 2010, p.286.
[5] WTO, "Anti-dumping Measures: By Reporting Member 01/01/1995-31/12/2016," accessed November 11, 2017, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.
[6] WTO, "China and the WTO: Dispute cases involving China," accessed November 11, 2017, https://www.wto.org/english/thewto_e/countries_e/china_e.htm.

**European Union - Measures Affecting Tariff Concessions on Certain Poultry Meat Products*	DS492	GATT
**United States - Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*	DS471	AD, GATT
European Union and Certain Member States - Certain Measures Affecting the Renewable Energy Generation Sector	DS452	GATT, SCM, TRIMs
**United States - Countervailing and Anti-Dumping Measures on Certain Products from China*	DS449	AD, GATT, SCM
**United States - Countervailing Duty Measures on Certain Products from China*	DS437	GATT, Protocol, SCM
**United States - Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*	DS422	AD, GATT
**European Union - Anti-Dumping Measures on Certain Footwear from China*	DS405	AD, GATT, Protocol of Accession, WTO
**United States - Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*	DS399	GATT, Protocol of Accession, Safeguards
**European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*	DS397	AD, GATT, Protocol of Accession, WTO
**United States - Certain Measures Affecting Imports of Poultry from China*	DS392	Agriculture, GATT, SPS
**United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*	DS379	AD, GATT, SCM
**United States - Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*	DS368	AD, GATT, SCM
**United States - Definitive Safeguard Measures on Imports of Certain Steel Products*	DS252	GATT, Safeguards

*Cases for which panel reports were issued.

The nonmarket economy concept is a distinctive feature applicable only to those specific countries that are transitioning their economy from state-control to a more market-oriented structure. It is a legal concept mandated under the section 15 of the WTO Accession Protocol reserved only for certain countries such as China and Vietnam.[7] The US, however, has been treating China as a nonmarket economy country ever since its first antidumping case against Chinese menthol in 1980.[8] From then on,

[7] WTO, *Accession of the People's Republic of China*, WT/L/432, adopted 23 November 2001; WTO, *Report of the Working Party on the Accession of Vietnam*, WT/ACC/VNM/48, adopted 27 October 2006.

[8] Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981), and 46 Fed. Reg. 24,614 (1981).

the US has maintained the position that Chinese prices and costs are unreliable in determining price comparability under national antidumping laws because they are determined through state intervention. Therefore, it has developed its own NME-specific methodologies for calculating the normal value of imports from NMEs. On the other hand, Chinese producers are continuously raising claims that the manner in which the US applies NME provisions involves arbitrary judgements and is inconsistent with the WTO Dispute Settlement.

This research aims to understand the implications of China's nonmarket economy status under the US' antidumping law. While previous literatures have focused its attention on tracing the origins of the nonmarket economy concept within the multilateral trading system, as well as under the US' own antidumping laws, this study takes the opposite approach: considering the consequences of the US applying its nonmarket economy provisions. Based on the evidence from antidumping cases initiated by the United States against Chinese products since 1980 to 2016, the study seeks to analyze the effect of nonmarket economy provisions on Chinese producers by understanding the specific issues raised during case proceedings. Furthermore, it aims to scrutinize prevailing criticism against the United States for having discretionary judgement in antidumping proceedings against China. Analysis of actual case proceedings provides a precise understanding of the implications of Chinese nonmarket economy status under the United States' antidumping law. By doing so, this paper can hopefully offer some understanding of the meaning of current nonmarket economy issues and their impact on Chinese producers.

1.2. Literature Reviews

The origin of the nonmarket economy concept in antidumping law can be attributed to growing imports from post-Soviet bloc countries coupled with an increasing influence of the market in the economies of such countries. The question of whether existing antidumping regulation can be applied to communist countries has been raised several times in history. For example, Wilczynski (1966) examined the problem of dumping in the context of communist central planning. He focused on analyzing the distinctive conditions and considerations which may enable and prompt centrally planned economies to pursue dumping in market economies. In particular, in analyzing examples of price undercutting by post-Soviet bloc countries during 1960-63, Wilczynski argued that dumping was not necessarily pursued to disrupt capitalist markets.[9] He suggested that without clear guidelines on how to apply antidumping rules to centrally-planned economies, the treatment of nonmarket economies in national antidumping laws would serve to complicate the harmonization of antidumping rules.[10] Furthermore, Anthony (1968) specifically focused on understanding the origin of the United States' anti-dumping law and its applicability to communist countries. He reviewed the economic premises of the Antidumping Act of 1921 and then examined the procedures and legal criteria for imposing an antidumping

[9] Wilczynski, J. "Dumping and Central Planning." *Journal of Political Economy* 74, no. 3, 1966, p. 261-262.
[10] Ibid.

duty, giving particular attention to the General Agreement on Tariffs and Trade (GATT) Antidumping Code of 1967 and the new regulation promulgated by the Treasury in 1968 to make procedures under American law conform to that Code. He traced the legal origin of the special fair value test for products from countries with a "State-Controlled Economy (SCE)", which was mainly Eastern European countries at the time.[11] Kostecki (1981) also argued that the issue of the applicability of antidumping law had been raised due to increasing levels of trade between Western and Eastern European countries after the demise of the Cold War.[12]

Although the concept of the nonmarket economy has its roots in the Cold War, the international antidumping arsenal has been changing due to the emergence of new economic threats, namely increasing Chinese exports. Snyder (2001) agrees that the nonmarket economy concept originates from the Cold War period.[13] He examined the evolution of multilateral trade negotiation rounds from the early 1960s, when work began to define detailed international rules of antidumping. During this period, the tension between legislative rules and administrative discretion prevailed in the United States. Snyder argued that the 'nonmarket economy' concept had evolved under historical circumstances and in the context of political, economic, social and symbolic

[11] Anthony, Robert A. "American Response to Dumping from Capitalist and Socialist Economies Substantive Premises and Restructured Procedures After the 1967 GATT Code." *Cornell L. Rev.* 54 (1968), p. 200-220.
[12] Kostecki, East-West Trade and the GATT System, St. Martin's Press for the Trade Policy Research Centre:London, 1979, p. 23-25.
[13] Francis Snyder, "The Origin of the 'Nonmarket Economy': Ideas, Pluralism & Power in EC Anti-dumping Law about China," *European Law Journal 7,* no. 4, 2001, p.374-375.

power.[14] The antidumping repertoire constructed in the Cold War context has shifted its interest toward protecting domestic industries from Chinese products because the power relations, too, have changed internationally. Polouektov (2002) also examined the negotiating history of GATT/WTO, as well as the WTO accession protocol for 'nonmarket economies' or what had previously been classified as 'state-controlled economies'. According to his analysis, the GATT was designed by market economies with objectives of trade liberalization and, as a consequence, initiatives by state-controlled economies to accede to the GATT in the early years of its operation could have produced peculiar results and policy implications.[15] However, he noted that the issue of nonmarket economies only began to escalate when transition economies with a large economic influence, like China and Vietnam, became members of the WTO.[16] He noted a striking resemblance between the accession of Eastern European countries to the GATT in the 1960-70s and that of large transitional economies to the WTO in recent years. Both scholars agreed that the treatment of nonmarket economies stems from political interests and shifts of power relations, rather than any economic rationale. Regardless of underlying intentions, not using 'normal' methodology for calculating the normal value against NME imports has become an accepted practice, notwithstanding the lack of any economic foundation for such 'NME methodology'.

[14] Ibid. p.373.
[15] Alexander Polouektov, "Non-market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations," *Journal of World Trade* 34, no.1, 2002, p.5-6.
[16] Ibid. p.24-25.

A notable example is the development of NME-specific provisions in the United States' antidumping law. The United States had to develop an administrative practice of dealing with allegations of dumping by such countries as traditional methods were considered unsuitable for the task of measuring price discrimination when those prices were set by a centralized public authority. Cuneo and Manuel (1981) were the first to raise concerns about the administrating authority's practice of determining whether a country has a state-controlled economy or not, as part of an antidumping investigation. They traced the evolutionary process of SCE provisions in the United States' antidumping law. Along with analyzing jurisdictional history, they reviewed several antidumping cases that addresses SCE provisions in practice. The case studies showed that the Department of Commerce had not clearly addressed the issue of using either a sectoral or an overall economy approach for SCE determination, and refused to make the adjustments necessary in order to make a proper price comparison between the United States' and foreign market prices.[17] Furthermore, they found that the concept of comparative advantage had been neglected in the SCE provisions.[18] He suggested that Congress should specifically address such issues under legal mandates by revising certain elements of the SCE provisions, such as: 1) greater conformity of the statute to the realities of an increasingly diverse international economic environment, and 2) greater specificity of the parameters to be utilized by

[17] Donald Cuneo and Charles Manual, "Roadblock to Trade: The State-controlled Economy Issue in Antidumping Law Administration." *Fordham International Law Journal*5, No. 2 (1982), p. 298-300.
[18] Ibid, p. 301.

the Department of Commerce in making the SCE determination. Horlick and Shuman (1984) also claimed that the administrating authority had to develop a method of handling allegations of dumping by SCE countries in practice as trade began to increase between the West and East European countries during 1950 and 1960.[19] However, they suggested that the practice of applying such a method would generate many new problems without a legal basis. By comparing the situation before and after the enforcement of the Trade Act of 1979, he found that both legally and practically, Congress codified the use of the surrogate country method against SCE countries.[20] However, according to his analysis, he found that such a method in practice presents enormous administrative difficulties and leaves open the possibility of an abuse of discretion by the administrating authority even after it had been codified under the law.

Under the United States' antidumping law, the approach of the Commerce Department to nonmarket economies in transition has been criticized as a work-in-progress, with only minimal guidance from Congress and the multilateral trading system on how to define and deal with NME countries. Many scholars have examined different methodologies developed by administrating authorities to deal with the special circumstances that arise in antidumping investigations against NME exporters. Verrill (1988) argued that the factors of production method represented a significant

[19] Horlick, Gary N., and Shannon S. Shuman. "Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws." *The International Lawyer* 18, no. 4, 1984, p. 808-812.
[20] Ibid. p. 817-828.

development towards the rational application of antidumping law to NMEs.[21] The revised methodology reflects efficacy created by producers by establishing new criteria for choosing an appropriate surrogate country.[22] On the other hand, Brashear (1989) criticized the Omnibus Trade and Competitiveness Act of 1988 for not effectively remedying existing problems with the law. Brashear argued that the Act only provided a definition of NMEs and switched the preference for calculating the foreign market value from the surrogate method to the factors of production method, while the fundamental problem of the surrogate country method remained embedded in the new methodology.[23] Bello et al. (1991) conducted a detailed analysis of jurisprudential history and its applicability in practice until the early 1990s. It demonstrated that applying the United States' unfair trade laws to NMEs has been, and remains, remarkably fluid, and having such flexibility is necessary due to dynamic nature of transitional economies.[24] According to their argument, the law necessarily reflects the reform process and evolution occurring within the NMEs themselves.[25] In later years, Lantz (1994) suggested that the United States should actively promote and reward

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[21] Verrill, Charles Owen, Jr. "Nonmarket Economy Dumping: New Directions in Fair Value Analysis." *George Washington Journal of International Law and Economics* 21, no. 3, 1988, p. 435.
[22] Ibid.
[23] Brashear, Lydia. "Factors or Prices? An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies." *American University Journal of International Law and Policy* 5, no. 3, 1990, p. 910-915
[24] Bello, Judith H., Holmer, Alan F., and Preiss, Jeremy O. "Searching for "bubbles of Capitalism": Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies." *George Washington Journal of International Law and Economics* 25, no. 3, 1992, p.667.
[25] Ibid. p. 703-706.

market reforms in these countries by applying unfair trade laws in a manner that ensures manufacturers in a transitional economy to receive fair, accurate, and predictable results in antidumping duty and countervailing duty investigations.[26] However, the question of how to promote and reward China's ongoing market reform in antidumping investigation still remains unsolved.

In previous studies on the application of antidumping laws to NMEs, most scholars have focused on the evolutionary process of jurisprudence concerning NME provisions under the United States' antidumping law. The dilemma of the US antidumping law results from the deficit of nonmarket economy regulation within the multilateral trading system, inconsistent methodologies for calculating a fair market value for such countries, and the complexity of transitional economies, and of China, in particular. While the applicability and implementation of NME provisions have been analyzed in detail based on the evolutionary process of jurisprudence, the application of antidumping law in practice should be supported by actual case studies. There is a strong consensus that the present laws regulating imports from NMEs have fundamental economic and legal flaws, however effective policy recommendation cannot be made without a consideration of the actual antidumping case proceedings. Understanding the issues raised during antidumping proceedings against NMEs, particularly against Chinese manufacturers, will provide detailed knowledge on the

[26] Robert H. Lantz, "Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Antidumping and Countervailing Duty Laws." *Am. UJ Int'l L. & Pol'y* 10 (1994), p. 1007-1009.

issue of the treatment of nonmarket economies and the application of NME methodology in practice.

1.3. Research Framework

To understand the implication of the United States' nonmarket economy provisions under its antidumping law, this paper primarily focuses on two questions. First, what is the framework of NME provision in the United States' antidumping laws? Second, how does it affect Chinese manufacturers in actual case proceedings? To answer the first question, this study analyzes the emergence and development of the 'nonmarket economy' concept through the of multilateral negotiations and the United States' antidumping laws. The historical discussion necessarily focuses on the relations between the Article VI of the GATT and the United States' antidumping laws. It compares the developmental process of antidumping provisions governing nonmarket economy countries. Unlike the gradual development in multilateral fora for antidumping laws, the United States has made significant progress in drafting rules for nonmarket economy countries, although its administration of nonmarket provisions has developed by more of a trial-and-error method in practice. The second question examines the administrative challenges in applying nonmarket economy provisions to Chinese imports. It aims to provide an overview of the effect of NME provisions and related antidumping calculating methodologies based on summaries of actual case proceedings.

This paper argues that the treatment of nonmarket economies under the United States' antidumping law implies the following legal and administrative challenges: 1) the rigid definition of nonmarket economy country concept in multilateral trade organization leads to huge administrative discretions for WTO members, especially for the United States 2) the impracticability of the market-oriented industry test implies that receiving market economy treatment by the United States is almost impossible for Chinese manufacturers and therefore, 3) they have no choice but to apply for the separate rate test, and even after Chinese manufacturers have passed such test, the results of the normal value calculation can be unpredictable because of numerous administrative hurdles.

To reach such conclusions, the argument is formed of three main parts. The first part traces the origin of the idea of a 'nonmarket economy' from the establishment of multilateral trade negotiations. It pays close attention to legal texts of Article VI of the GATT and how it evolved through following rounds of talks. It argues that systematic issues in applying NME provisions under the United States' antidumping law stem from inflexible definition of nonmarket economy country in the multilateral trading system.

The second part examines the evolutionary process of NME provisions under the United States' antidumping statutes based on specific case studies that had a significant influence in shaping the laws. It pays close attention to dumping cases from China that took place between 1980 and 2016. It argues that the United States developed inconsistent methodologies for calculating the fair market value for

nonmarket economies, particularly China, due to administrative difficulties in applying the NME concept in practice.

The final section focuses on analyzing the implications of NME provisions for Chinese respondents. It discusses the systematic challenges in administering NME provisions in actual case proceedings. Unlike previous studies, this article analyzes actual case proceedings and summarizes the final antidumping duties imposed on Chinese respondents. By doing so, it hopes to provide an in-depth understanding of the issue of nonmarket economy treatment in practice, which is an issue that has been deeply embedded in the multilateral trading system ever since its establishment.

Chapter II. History of NME Provisions in the GATT/WTO Negotiations

2.1. Regulating State-Controlled Economies in Pre-GATT years

The objective and purpose of establishing multilateral institutions for international trade originate in large part from the United States. The United States Congress invited a number of countries to discuss a multilateral agreement for the mutual reductions of tariffs in 1945. Along with the tariff reduction efforts, the United States also envisioned the establishment of an 'International Trade Organization (ITO)' and published a draft ITO Charter during the United Stations Economic and Social Council (ECOSOC) meeting in 1946. These intertwined efforts to prepare for an international trade institution and to negotiate reciprocal tariff reduction were supported by the United States' allies, and particularly by Great Britain. Political leaders in the US and elsewhere have continuously emphasized the importance of establishing a post-war economic institution that would prevent countries from pursuing protectionist economic policies. This line of thought stemmed from the view

that recent mistakes concerning economic policy were a major cause of the disasters that led to World War II.[27]

In this regard, the United States continuously put forward regulation dealing with the factors impeding trade liberalization. The main concerns of the United States at the time were the gradual reduction of trade barriers and non-discrimination.[28] At the first session of the UN ECOSOC, the United States proposed a 'Suggested Charter for an ITO' to regulate state-trading activities. The Charter served as the basis for negotiations by the Preparatory Committee for the ITO and later, in 1948, it led to drafting of the Havana Charter. The Suggested Charter included three specific articles on what is deemed to be state-trading activities, which are 1) Non-discriminatory Administration of State-Trading Enterprises, 2) Expansion of Trade by Monopolies of Individual Products, and 3) Expansion of Trade by Complete State Monopolies of Import Trade.[29] These articles had been drafted based on a specific concern about the practices of the Soviet Union, the only country with a state-led foreign trade monopoly at the time.[30]

At the first session of the ECOSOC, the Soviet Union voted for the establishment of the ITO. However, it later declined to participate in the deliberation of the Preparatory Committee on political grounds and did not show interest in the

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[27] John H. Jackson, *Restructuring the GATT System,* Royal Institute of International Affair*,* 1990, p. 9.
[28] Snyder, op cit. p. 378.
[29] Suggested Charter for an International Trade Organization of the United Nations (Department of State, September 1946).
[30] Polouektov, op cit. p. 5-6.

parallel negotiations that led to the formation of the GATT. Therefore, the regulations on state trading activities seemed unnecessary and only one of the articles from the Suggested Charter was eventually included, becoming Article XVII, which obligated state-trading enterprises to abide by the general principles of non-discriminatory treatment.[31]

The founders of the multilateral trade institutions presumably considered state trading to be a deviant feature, and sought to significantly regulate state trading activities. This thinking was based on a premise that the economy is best left in the hands of private enterprise and should be removed as much as possible from the reach of the state.[32] However, it was also considered appropriate to exclude the provisions regarding state trading by transitional economies, which were, to a large extent, considered only a passing phenomenon of the post-war period.[33] As a result, there are no legal provisions under the General Agreement dealing with an economic system that is not based on market principles.

2.2. GATT Article VI and the Interpretative Note

The GATT Article VI applied unilaterally regardless of the type of economic system of the country.[34] However, the first challenge to this rule was raised by

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[31] Ibid.
[32] Jackson, op cit. p. 403-406.
[33] Polouektov, op cit. p. 5.
[34] In terms of the Article VI(1) GATT 1947, 'a product is to be considered as being introduced

Czechoslovakia, when it questioned the applicability of the GATT Article VI on a transitional economy, whereby the economy was undergoing restructuring from a state-planned system to a market economy. In the 1954-55 GATT Review Session, Czechoslovakia proposed to the Working Party on 'Other Barriers to Trade' that subparagraph 1(b) of GATT Article VI be amended to deal with the problem of finding comparable prices in countries where all or substantially all of trade is determined by a state monopoly.[35] GATT Members were not prepared to amend Article VI in this respect, but the Working Party decided to add an interpretative note to the first paragraph of Article VI.[36] The interpretative note stated that:

> 'It is recognised that, in the case of imports from a country *which has a complete or substantially complete monopoly of its trade and all domestic prices are fixed by the State*, special difficulties may exist in determining price comparability for the purpose of paragraph I, and in such case importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a county may not always be appropriate (emphasis added).'[37]

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into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) at less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of product of the product in the country of origin plus a reasonable addition for selling cost and profit'

[35] Czechoslovakia was a market economy when the GATT was drafted and its later incorporation into the Soviet bloc did not affect its status as a GATT Member, *See* Snyder, 380-384; *See also* Kostecki, East-West Trade and the GATT System, St. Martin's Press for the Trade Policy Research Centre:London, 1979, p. 23-25; Grzybowski, "Socialist Countries in GATT." *The American Journal of Comparative Law* 28, no.4 (1980), p. 547.

[36] Amelia Porges, Friedl Weiss, Petros C. Mavroidis, *Analytical Index:Guide to GATT Law and Practice.* Updated 6th ed. Bernan, 1995, p. 228.

[37] Second Supplementary Provision to Paragraph 1 of Article VI in Annex I to GATT 1947.

Although it is hard to understand the rationale behind Czechoslovakia's proposal, nothing seemed to immediately threaten its interests at that time.[38] This provision was a mere statement of fact as it did not provide specific guidelines on what course of action investigating authorities should take in dealing with centrally-planned economies. Furthermore, the GATT was merely an *ad hoc* arrangement and did not have the legal authority to regulate the practices of its contracting parties. However, the interpretative note was later incorporated into a Protocol Amending the Preamble Part II and III of GATT,[39] and as a result, it became binding on all GATT contracting parties and this eventually opened the floodgate for various legal interpretations.

The first traceable investigation involving dumping from a centrally-planned economy took place in 1960, which involved bicycles from Czechoslovakia.[40] During the investigation, the United States determined that prices and cost information provided by Czechoslovakian producers could not be accepted when calculating the fair market value on the grounds that the country was considered to have a state-controlled economy that fell under the criteria of the interpretative note. Therefore, the investigating authority instituted a method for deriving the fair market value from a third country, i.e. manufacturers in a noncommunist market economy.[41]

When this issue was raised by Czechoslovakia, it presumably wished to elaborate on the missing element of GATT Article VI. However, as a result, a simple

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[38] Polouektov, op cit. p. 8.
[39] Protocol Amending the Preamble and Parts II and III, w.9/242, 246. *See* Porges et al., op. cit. p. 255-256.
[40] Final Determination of Bicycles from Czechoslovakia, 25 Fed. Reg. at 6657, 1960.
[41] Ibid.

recognition of the "inappropriateness" of a strict comparison with domestic prices in state-trading countries generated enormous flexibilities for interpretations by contracting parties. First, it was uncertain which countries fitted the criteria of having 'a complete or substantially complete monopoly of its trade' and 'all domestic prices are fixed by the State.' Moreover, even if a country fitted said criteria, there were no specific guidelines for how to conduct a price comparison for the country in question. In addition, for the first time in history, the interpretative note confirmed that a strict comparison with domestic prices may not be always possible under the GATT Article VI. In a sense, the Working Party acknowledged that 'normal' antidumping calculating methodology, as stipulated by the GATT Article VI, may not apply to certain countries, and thus alternative methodologies could be used to calculate a dumping margin for such countries. In practice, however, these issues of how to determine which country falls under the scope of application and what kind of alternative methodology should be applied in the case of the GATT Article VI were deemed insufficient and these questions were left to the discretion of national administrations. As subsequent developments in the multilateral trade negotiations have shown, the room for flexibility in national legislation has only widened.

2.3. The Kennedy Round Antidumping Code

The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, also known as the Antidumping Code, sought to

harmonize the application of the GATT Article VI.[42] Even after Article VI came into effect, differing national interpretations and administrative practices of antidumping law constituted major non-tariff barriers to trade.[43] To address this issue, the GATT contracting parties agreed upon the Antidumping Code as part of the Kennedy Round negotiations, which took place between 1963 and 1967. The main purpose of the Antidumping Code was to provide a uniform basis for the application of Article VI of the GATT–not to amend it.[44]

Thus, the Kennedy Round Antidumping Code embodied a significant reconfiguration of the antidumping rules. It also elaborated the rules on how to calculate the dumping margin in the case that a strict price comparison is not feasible in an antidumping investigation. To further explain, Article 2(d) of the Antidumping Code provides for a specific scenario in case exceptional antidumping rules apply:

> 'When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling or any other costs and for profits…'[45]

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[42] Agreement on the Implementation of Article VI of the General Agreement on Tariff and Trade (General Agreement on tariffs and Trade, Geneva, 1979), GATT, BISD 26th Supp at 171 (1980)[hereinafter as Antidumping Code], Art. 1.
[43] Edwin Vermulst, *Antidumping law and practice in the United States and the European Communities: a comparative analysis,* North-Holland, 1987, 510-511.
[44] Snyder, op. cit. p. 387.
[45] Anti-Dumping Code, Art. 2(d).

Furthermore, Article 2(g) stipulated that this Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement.[46]

The Article 2(d) does not necessarily address the fundamental question of whether it is possible to use sales prices in a state-controlled economy for the determination of the normal value. Instead, it focuses on calculating the margin of dumping, which is the amount by which the normal value exceeds the export price of the given product. Unlike the interpretative note, the Article 2(d) provides for two different scenarios when it is inappropriate to conduct a proper sales comparison. These scenarios are 1) when there are 'no sales of like product in the ordinary course of trade', and 2) because of 'the particular market situation.' Although the definition of and conditions for 'the ordinary course of trade' and 'the particular market situation' are ambiguous, yet in this case, the Code explicitly provides that the margin of dumping shall be determined by reference to either a third country export price or the cost of production in the country of origin, plus a reasonable addition for selling cost and profit.

However, the Kennedy Round Code had a separate legal standing from the GATT:[47] the contracting parties were free to sign it or not.[48] The United States, for

[46] Anti-Dumping Code, Art. 2(g).
[47] The Antidumping Code differed from Article VI GATT in that the Code imposed directly binding obligations on its signatories. *See* Snyder, op. cit. p. 111.
[48] Terence Stewart, *The Uruguay Round: a negotiating history, 1986-1992*, Kluwer Law International Vol.1, 1993, p. 1431.

example, decided not to adopt the Code, although it contributed significantly to its drafting.[49]

2.4. Accession of State-Controlled Economies to the GATT

After the Kennedy Round negotiations were complete, the issue of the application of the GATT Article VI to state-controlled economies came to the fore. Several Central and Eastern European Countries – like Poland, Romania and Hungary – began to prepare for accession to the GATT. This was part of the gradual process of détente, including the development of increasing institutional ties between the United States and the Soviet bloc.[50] Working parties were established to prepare for their accession and these groups offered different proposals as to how to deal with dumping committed by state-controlled economies.[51]

The first former-Soviet country to accede to the GATT was Poland. The Working Party on the Accession of Poland was launched in 1959, and its report was adopted on 26th June 1967.[52] The record shows that Poland understood that the

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[49] Snyder, op. cit. p. 390-392.
[50] Ibid, p. 392-395.
[51] For detailed analysis on the GATT accession process of Poland, Romania and Hungary, *see* Kostecki. *East-West Trade and the GATT System* St. Martin's Press for the Trade Policy Research:London, 1979; Polouektov, "Non-market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations." *Journal of World Trade* 34, 2000.
[52] GATT, "Accession of Poland, Report of the Working Party," adopted on 26 June 1967 (L/2806), BISD, 15th Supplement (Geneva, April 1968).

interpretative note to the GATT Article VI may apply, yet it agreed to abide by the terms. The Working Party subscribed to the following provisions:

> 'a contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, as long as the method used for determining normal value in any particular case is appropriate and not unreasonable.[53]

Poland thus relinquished any use of domestic pricing as part of its commitments to the GATT. Similar normative language had also been included in the Report of the Working Party on the Accession of Romania[54] and the Report of the Working Party on the Accession of Hungary.[55] The method of determining normal value with regards to state-controlled economies was introduced as a necessary means of combating the trade-distorting features of centrally-planned systems, e.g. a state monopoly of foreign trade and state-controlled prices. In other words, it is a special safeguard provision to deal with the possible sudden inflow of imports from those countries due to planning decisions taken by state bodies.[56]

The practice of using surrogate values essentially originates from the US Treasury.[57] However, the use of the surrogate approach also began to spread to the European Community, which made both implicit and explicit use of the interpretative

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[53] Ibid.
[54] GATT, "Protocol for the Accession of Romania to the GATT," BISD, 18th Supplement (Geneva, April 1972).
[55] GATT, "Protocol for the Accession of Hungary to the GATT," BISD, 20th Supplement (Geneva, 1974).
[56] Polouektov, op cit. p. 12.
[57] Snyder, op cit. p. 393.

note.[58] The nonmarket economy provision included in the accession of Poland was the first time that a state-controlled economy formally expressed acceptance of the surrogate country approach, albeit in the context of a GATT accession negotiation. From then on, using the price in a surrogate country to determine the normal value in a state-controlled economy dumping case became an accepted practice under the GATT. Moreover, the question of whether this administrative practice was consistent with the GATT Article VI, the interpretative note and the Kennedy Round Antidumping Code was consigned to history.

2.5. Revision of Antidumping Code in Tokyo Round

The Tokyo Round served as a major effort to harmonize the substantive, and to lesser extent, the procedural aspects of the antidumping statutes of WTO members.[59] The Tokyo Round concluded with 13 different agreements, two of which were codes relating to state-controlled economies. The first was the Agreement on Implementation

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[58] Ibid. The EC was a signatory of the Kennedy Round Antidumping Code but it was not a member of GATT. In 1968, the EC adopted its first anti-dumping legislation, Council Regulation 459/68 to implement the GATT Antidumping Code. The European Union reiterated Article 2(d) of the Code in Article 3(2) of its Regulation. It also included the Article 3(6) in the Regulation which was basically the restatement of the 1955 Interpretative Note. It provided that: 'In the case of import from countries *where trade is on a basis of near or total monopoly and where domestic prices are fixed by the state*, account may be taken of the fact that an exact comparison between the export price or a product to the Community and the domestic prices in that country *may not always be appropriate*, since in such cases, *special difficulties* may arise in determining the comparability of prices.' In practice, the administrating authority excluded the use of state-trading country domestic prices based on its administrative discretion within the ambiguous legislative framework of the Kennedy Round Antidumping Code.

[59] Lantz, op cit. p. 1000.

of Article VI of the General Agreement on Tariff and Trade, known as the 1979 Antidumping Code.[60] The second was the Agreement on Interpretation and Application of Article VI, XVI and XXIII of the General Agreement on Tariff and Trade, known as the Subsidies Code.[61] Theses codes served to elaborate on the Kennedy Round Antidumping Code and codified most of the basic rules on the determination of dumping margins, or a substitute for normal value, in state-trading country dumping.[62]

Furthermore, the Subsidies Code was agreed before the Antidumping Code and it had significant political influence on the US trade policy.[63] In particular, Article 15 of the Subsidies Code significantly influenced the enactment of the United States' Trade Agreement Act of 1974.[64] To elaborate, Article 15 of the Subsidies Code is concerned with 'special situations', which is similar to the 'particular market situations' expression found within the Kennedy Round Antidumping Code. The article stipulates that the special situation may arise from 'a country which has a complete or substantially monopoly of its trade' and 'where all domestic prices are fixed by the State.' In a case involving dumping committed by such a country, the

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[60] Antidumping Code.
[61] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code).
[62] Snyder, op cit. p. 407.
[63] J. F. Beseler and A. N. Williams, *Anti-dumping and Anti-subsidy Law : The European Communities,* London: Sweet & Maxwell, 1986, p. 11-18.
[64] Trade Agreements Act of 1979, Pub.L. No. 96-39, 1979 US Code Cong. & Admin. News 93 Stat. 144, codified at 19 U.S.C. § 1677b(c)(1982).

importing country is given latitude in determining whether to use alternative methods to calculate the normal value, as stipulated below:

> '1. In cases of alleged injury caused by imports from a country described in NOTES and SUPPLEMENTAL PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2 [i.e., a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State'] the importing signatory may base its procedures and measures either
>
> (a) on this Agreement, or, alternatively
>
> (b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.
>
> 2. It is understood that in both cases (a) and (b) above the calculation of the margin of dumping or of the amount of the estimated subsidy can be made by comparison of the export price with
>
> (a) the price at which a like product of a country other than the importing signatory or those mentioned above is sold, or
>
> (b) the constructed value of a like product in a country other than the importing signatory or those mentioned above.
>
> 3. If neither prices nor constructed value as established under (a) or (b) of paragraph 2 above provide an adequate basis for determination of dumping and subsidization then the price in the importing signatory, if necessary duly adjusted to reflect reasonable profits, may be used.'[65]

This provision represents the following developments from the previous antidumping code. First, it allowed the importing countries to use either antidumping duties or countervailing duties, but not both together, to take action against the exports of state-trading countries.[66] Second, it allowed the dumping margin to be determined on the basis of a surrogate country, using real prices or constructed values. Third, in the case that neither 2(a) or 2(b) are permissible, under the Article 15(3), pricing information

[65] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code).
[66] Snyder, op cit. p. 406.

from the importing country can be used to calculate the dumping margin. Finally, the surrogate country price, or a constructed price in the surrogate country, came to take precedence over the use of the price of the importing country's market.

Building on the foundations of the Kennedy Round Antidumping Code, the Code on Subsidies and Countervailing Duties expanded the rules on dumping by state-controlled economies. One of the reasons for such a development was that the existing rules had posed many administrative challenges in practice. When handling dumping cases involving state-controlled economies, the United States had routinely used either a non-state-controlled economy's prices for either home consumption or export in third countries.[67] However, the surrogate method presented difficulties in its application because there were cases in which no comparable surrogate country was available. The most prominent example is the case of the Electric Golf Cars from Poland.[68] The Treasury typically conducted dumping investigations using the constructed values of golf cars in Canada, the only country besides Poland and the United States that produced golf cars in sufficient quantities.[69] However, when Canadian producers

[67] Although the provision for use of a constructed value in a non-state-controlled economy was added in the Trade Act of 1974, it was not utilized. *See,* e.g., Clear Sheet Glass from Romania, 41 Fed. Reg. 14,909 (1976); Animal Glue and Inedible Gelatin from Yugoslavia, 42 Fed. Reg. 4,922 (1977) and 42 Fed. Reg. 39,288 (1977). In the *Inedible Gelatin* case, Treasury subsequently used home market prices in Yugoslavia since it was determined that "the economy of Yugoslavia is not state-controlled to an extent that sales or offers of sales of such or similar merchandise in Yugoslavia do not permit a determination of foreign market value under section 205(a) of the Antidumping Act (19 U.S.C. 164(a))."

[68] Electric Golf Cars from Poland: Antidumping Determination of Sales at Less Than Fair Value, 40 Fed. Reg. 25,497 (1975).

[69] Louis Schwartz, "Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations." *University of Pennsylvania Law Review* 128, no. 1, 1979, p. 219-220.

ceased to manufacture golf cars in 1975, it became a problem to find an appropriate surrogate country. The Polish producer urged the Treasury not to use the United States' price or a constructed value because doing so would completely offset their comparative advantage in the primary export market. The Poles were not producing for their home market and the United States' market appeared to be the main target of Polish production.[70] In response to their concern, the Treasury amended its regulations and they remain applicable to this day.[71] In the case that there are no non-state-controlled economies of comparable economic development producing such or similar merchandise, the Treasury allowed the construction of a normal value based on factors of production.[72] Such components or factors include the hours of labor required, the quantities of raw materials used and the amount of energy consumed.[73] This information must be obtained from the producer of the merchandise in the non-state-controlled economy under investigation, and verified to the satisfaction of the Secretary (of the administering authority).[74] As a last resort, the United States' price or a constructed value of such or similar merchandise may be considered instead.[75] In essence, the Trade Agreement Act of 1974 was established with the objective of being entirely consistent with Article 15 of the Tokyo Round Subsidies Code.[76]

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[70] Ibid.
[71] Department of Treasury, Antidumping Investigation Procedures under Antidumping Act, 1921, 43 Fed. Reg. 35,263 (1978).
[72] 19 C.F.R. § 353.8(c).
[73] Ibid.
[74] Ibid.
[75] Ibid. § 353.8(b)(3).
[76] Snyder, op cit. p. 407.

2.6. Beyond the Uruguay Round Antidumping Agreement

The 1994 WTO Agreement on Implementation of Article VI or the Antidumping Agreement (ADA) governs the application of the GATT Article VI to actions taken under national antidumping laws or regulation.[77] It provides substantive and procedural rules for the conduct of antidumping investigations. The Antidumping Agreement provides that antidumping measures may be applied "only under the circumstance" provided for in Article VI and "conducted in accordance with the provisions" of the Agreement.[78] Unlike the series of Codes, the Agreement provides that all countries which become members of the WTO will automatically become subject to the same antidumping rules. Such an enforcement mechanism was an important breakthrough in establishing multilateral rules for regulating national trade policies.

The Antidumping Agreement reaffirmed that dumping occurs when a product is introduced into the economy of another country at less than its normal value.[79] Thus to determine whether sales of a product were made at less than its normal value, the importing country must compare the export price of a good to its normal value. Article 2.1 of the ADA provides that a product is to be considered as being dumped if the

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[77] WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994), Art. 1.
[78] Ibid.
[79] Ibid.

export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Antidumping duty is imposed generally to combat sales below "normal value"[80] or below "fair value".[81] Thus, calculation of normal value is key to assessing the dumping margin. Article 2.1 indirectly defines normal value as the typical price of a like product in the exporting country when destined for consumption in the ordinary course of trade.

Additionally, Article 2.2 provides for the case in which it is impossible to calculate a normal value as defined under Article 2.1. It stipulates that when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined with a comparable price of the like product when exported to an appropriate third country, or with the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits. The ADA leaves the investigating authority to make a choice between the two methods – third country exports or constructed normal value – if it finds itself in one of the three situations: no domestic sales of the like product in the ordinary course of trade, insufficient (less than

[80] GATT, art. VI, 61 Stat. A23 (1947), *as modified,* 62 Stat 3682, T.I.A.S. No. 1890 (1948).
[81] *See* e.g., the American definition of "fair value" included in the Treasury Department's Antidumping Regulations, 19 C.F.R. §§ 153.2-153.

5 per cent) domestic sales of the like product, or a particular market situation in the domestic market.

Another provision that allows for alternative method for calculating the normal value is laid out in Article 2.7 of the ADA. It stipulates that Article 2 is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to GATT 1994. The second Supplementary Provision states that in the case of imports from a country which has a complete or substantially complete monopoly of its trade, and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purpose of paragraph 1. In such cases, importing countries may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. The provision has been used as the basis for investigating authorities to ignore the prices and costs in 'nonmarket economies', on the basis that such prices and costs are unreliable since they are determined not by market forces but by the State. As a consequence, authorities would then use the prices or costs of a market economy country as the basis for normal value in such cases involving nonmarket economies, which is known as the surrogate country or analogue country method.

The blunt definition of a 'nonmarket economy' in the Antidumping Agreement introduced many interpretative challenges to the WTO Dispute Settlement System regarding the treatment of nonmarket economy status and the application of NME-specific methodologies in antidumping proceedings. Since the definition of a nonmarket economy is restrictive, requiring that the importing country proves

'complete or substantially complete State monopoly of trade and prices fixed by the State', compliance with Article 2.7 of the ADA is difficult in nature. Thus, specific clauses were included in the protocol of accession as a result of the negotiations surrounding the accession of some countries to the WTO, the most notable example being China.

2-6-1. China's WTO Accession Protocol and its Nonmarket Economy Status

Pursuant to Article XII of the WTO Agreement, China acceded to the WTO under terms set out in the China Protocol on 11th December 2001. It signed the Protocol of Accession, which "include[s] the commitments referred to in paragraph 342 of the Working Party Report" as an "integral part of the WTO Agreement". China was required to make a market access commitment and amend rules to comply with the WTO Agreement. Unlike any other previous WTO accession, the terms of China's accession included not only market access commitments on goods and services, but also a large number of special rules that elaborated, expanded or modified the existing provisions of the WTO Agreement.[82] The rules were set out in the text of the accession protocol and in more than 140 paragraphs of the Report of the Working Party on the Accession of China (the Working Party Report) that were later

[82] Julia Ya Y. Qin, ""WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol." *Journal of World Trade* 37, no. 3, 2003, p. 483.

incorporated into the Protocol.[83] Since the protocol was made 'an integral part of the WTO Agreement',[84] all the China-specific rules have since become part of a 'covered agreement' for the purpose of the Understanding on Rules and Procedures Government the Settlement of Disputes (DSU), enforceable through the WTO dispute-settlement procedure.

Among its commitments, China agreed to accept special provisions relating to how other members treat its exports in their antidumping and countervailing duty investigations. The chapeau of section 15 lays out the general rule that the Anti-Dumping Agreement will apply to all antidumping proceedings involving imports from China. That rule, however, is to be applied alongside the special provisions set out in paragraphs (a) through (d) of that section. Subparagraph (a) prescribes that, in determining price comparability in anti-dumping proceedings involving products of Chinese origin, investigating authorities are authorized to use, "a methodology that is not based on a strict comparison with domestic prices or costs." The original text stipulates as follows:

> '15. Price Comparability in Determining Subsidies and Dumping
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the Subsidies and Countervailing Measures (SCM) Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either

[83] WTO, Working Party on the Accession of China, *Report of the Working Party on the Accession of China,* WT/ACC/CHN/49 (1 October 2001), at 29-31 and Part I, Section 1 of WTO, *Accession of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organization* (10 November 2001).
[84] WTO, *Accession of the People's Republic of China,* WT/L/432, 23 November 2001.

Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices and costs for the industry under investigation

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

…

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.'[85]

The introduction of these specific rules in the accession protocol has two fundamental consequences for China. First, it clearly provides that China will be treated as a nonmarket economy country under Article VI of the GATT 1994. This, in other words, implies that the Chinese prices and costs for any industry under investigation can be contested by the importing country if it finds such information to be unreliable. Contrary to the interpretative note in the Uruguay Antidumping Agreement, the burden to prove the existence of market economy characteristics falls

[85] Ibid.

onto the Chinese firms. Second, section 15(d) sets out the procedure for graduating from nonmarket economy status and also provides an expiration date for the NME assumption, which follows the importing country's legal definition of nonmarket economy, instead of using the more restrictive NME definition contained in the interpretative note to the GATT Article VI:1. As a consequence of this provision, the legal definition of nonmarket economy country in national antidumping statutes and its application in practice significantly affects the imposition of antidumping duties involving Chinese products.

Due to this provision, China has been seeking its market economy status bilaterally with certain WTO importing country as a condition for negotiating free trade agreements. Several countries have granted earlier recognition of market economy status to China through political declaration of recognition not by written legal documents. Among the countries that have implemented the decision to grant market economy status to China, only Australia and South Africa are the leading users of antidumping proceedings. Unfortunately, the benefit of receiving a market economy status is not significant unless main users of antidumping rule grants such an advantage. In essence, those countries that actively use antidumping mechanism against Chinese products – e.g., the United States, the European Union, Japan, Canada, Mexico and India – are still considering China as a nonmarket economy and have different interpretations about its market reform in opposition to Chinese government. As a consequence of diverging application of nonmarket economy rule within WTO member countries, the two different procedures: 1) graduating from nonmarket

economy status under the section 15 of China's accession protocol and; 2) recognizing China as a market economy have become totally reliant on a political maneuver rather than considering its actual economic reform process.

Chapter III. Evolution of the United States' Antidumping Laws to China

3.1. Rationale of the NME Provision

Traditionally, the capitalist countries have continuously raised allegation of dumping by the centrally-planned economies.[86] Complaints against the communist countries' dumping were first raised in the 1930s, when the Soviet Union dumped quantities of grains, oils, timber, furs, flax, and coal in the world market at unusually low prices when capitalist countries exporting primary goods were in the midst of difficult economic situations.[87] However, dumping by communist countries caused no concern until the middle of 1950s. During this time, the Eastern European countries began to de-Stalinize their political and economic system, gradually leading to export drives in the world markets.[88] The phenomenon of the centrally-planned economies disposing exports at "the prices below those of comparable products exported from capitalist economies" has been studied in the numerous publications and articles.[89]

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[86] Wilczynski, op cit. p. 250-251.
[87] Ibid.
[88] Ibid. Communist countries made concerted efforts to expand intra-bloc trade during 1948-53. From then on, however, extra-bloc trade has been increasing much faster than intra-bloc trade. Extra-bloc trade represented 87, 54, 20, and 51 per cent in 1938, 1948, 1952, and 1964, respectively.
[89] Wilczynski, op cit. p. 250-251.

One explanation of dumping by transitional economies is due to a strategy of price discrimination. Evidence shows that the centrally-planned economies not only practice price discrimination in intra-bloc trade but also in extra-bloc exports in order to compete in competitive market environment.[90] Theoretically, when a foreign firm dumps a product in the exporting market, domestic producers that cannot compete at lower prices will lose market share or be driven from the market.[91] In the short term, consumers in the exporting market initially enjoy lower prices due to the dumping of foreign merchandise.[92] However, in long term, the foreign firm may recoup its initial losses by charging a higher price, or failing to lower the price for its merchandise once it occupy considerable market share.[93] Although it is uncertain whether the centrally-planned economies' firms were intended to disrupt market competition, regardless of their intention, the price discrimination was commonly practiced by such countries in the course of their economic reforms.[94]

Second argument is that the communist countries genuinely have low cost of production. In Hecksher-Ohlin model, a country relatively abundant in labor has comparative advantage in producing labor intensive products. This in turn imply low-priced export products are genuinely produced with cheap labors. However, the question as to what extent the bloc countries have genuinely low labor costs can be answered by two explanations. First, the Communist countries deliberately pursue so-

[90] Wilczynski, op cit. p. 253-254.
[91] Lantz, op cit. p. 998.
[92] Ibid.
[93] Ibid.
[94] Wilczynski, op cit. p. 253-254.

called rational low-wage policies in their industrialization drives; wages are the obvious fund to finance the gigantic (in relation to voluntary saving) investment programs.[95] Second, production increase can also be achieved by non-material concerns, such as membership in the communist party, title of labor hero, distinction of a 'red flag' medal or so.[96] In other words, the concept of profit may have a different meaning in centrally-planned economies from that under capitalist markets.

In essence, dumping from communist country had been a natural phenomenon considering its vibrant economic and political situation. These countries may have genuinely low cost of production as a logical consequence of economic and social setup in force. And these low costs may be quite legitimate in the context of central-planning of the communist type. However, the focus on the reasons why companies dump has often been considered irrelevant in national antidumping laws. Since the beginning of the twentieth century, the national antidumping laws required to impose protective measures against dumping if such dumping causes material injury in the importing country.[97]

The United States antidumping statutes, for example, are designed to even the playing field between foreign firms' dumping products and the United States' firms facing the prospect of losing market share.[98] So although the there is hardly any evidence to suggest that a centrally-planned economy dumping case has intended to

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[95] Ibid.
[96] Ibid.
[97] Vermulst, op cit. p. 1-3.
[98] Lantz, op cit. p. 998.

cause disruptive effect, the fact that low pricing caused material injury to domestic producers of importing country was sufficient to initiate antidumping investigation. The antidumping duties, therefore, are calculated in order to nullify any material injury caused by foreign firm's dumping practices.[99] Thus, the dumping margin was calculated as accurately as possible to assess an antidumping duty equal to the amount by which the fair market value of the foreign merchandise exceeds the United States' price as part of the dumping determination.[100]

However, when the GATT contracting members for the first time recognized that it is impossible to determine the normal value of a good when domestic prices are fixed by the State and added an interpretative note to Article VI in 1950s, by doing so, it automatically placed an administrative burden on national authority to calculate the dumping margin from state-controlled economies. Soon after, the United States Treasury Department had to address dumping from Czechoslovakia and therefore, it came up with so-called the surrogate country method in determining the normal value of nonmarket economy country. Gradually, other countries started to follow the US practice and used the surrogate country values in calculating the normal value of products exported from nonmarket economies. However, since the task of determining appropriate surrogate country was completely responsible for the investigating

[99] Ibid.
[100] 19 U.S.C. § 1673(e) (1988); Rhone Poulenc, Inc. v. United States, 899 F. Supp. 1185, 1190 (Fed. Cir. 1990) (holding that accurate dumping margins are necessary to accomplish purpose of the AD statute).

authority, it opened the possibility of an abuse of discretion by the administrating authority.

3.2. Regulating State-Controlled Economies before 1979

3-2-1. The Birth of Surrogate Country Method

When the first antidumping statute was established, the United States did not require a bifurcated methodology for dealing with nonmarket economy dumping cases.[101] The issue of how to calculate the foreign market value of a product when imported from nonmarket economy country was first raised in the *Bicycles from Czechoslovakia* case.[102] The Treasury Department made an affirmative determination that sales of imports from Czechoslovakia at less than fair value does not reflect market concept of supply and demand.[103] It determined that prices and costs information provided by state-controlled economy producers cannot be accepted as a fair market value. As a result, the Treasury Department adopted the practice of referring to the domestic or export prices of similar merchandise manufactured in a non-communist market economy country as the best evidence available for the fair

[101] The United States first promulgated Anti-dumping statutes as part of the Revenue Act of 1961. Later, Congress replaced almost all of the 1916 Act and enacted Antidumping Act of 1921.
[102] Final Determination of Bicycles from Czechoslovakia, 25 Fed. Reg. at 6657, (1960).
[103] Ibid.

value.[104] In antidumping investigation of *Jalousie-Louvre-Sized Sheet glass from Czechoslovakia*, the Treasury reaffirmed this practice by refusing to rely on the export price of Czechoslovakia, because it was allegedly a state-controlled economy.[105] Also in *Portland Cement from Poland* case, the Treasury concluded that home market sales of state-controlled economy imports did not qualify as sales "in the ordinary course of trade" as required by section 205(a) of the Antidumping Act of 1921.[106] Thus, the Treasury relied on a constructed value based on sales price for export to the United States by a West European country to calculate the fair value.[107] However, it did not record specific name of the surrogate country, and reasons for choosing such country.

In 1974, the Treasury promulgated a new provision dealing explicitly with state-controlled economy dumping.[108] This provision adopted the Treasury practice of using market economy prices as a surrogate value. However, the choice of appropriate surrogate country was solely based on the fact that it was a market economy country, and manufactures "such or similar" merchandise to that under investigation. The surrogate country methodology posed difficulty in application because in some cases, there was no comparable surrogate country available. The administrative challenge of surrogate country method first appeared in the *Electric Golf Cars from Poland* case.[109]

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[104] Ibid.
[105] Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia, 27 Fed. Reg. 8457 (1962) *See* also Judith Bello, op cit. p. 427.
[106] Fair Value Determination: Portland Cement from Poland, 28 Fed. Reg. 6660 (1963).
[107] Ibid.
[108] Judith Bello, op cit. p. 674.
[109] Electric Golf Cars from Poland; Antidumping, 40 Fed Reg 25,497 (1975).

In *Electric Golf Cars,* the Treasury had been relying on the Canadian producer's information on export price of golf cars when dumping occurred from Poland because it was the only other country that produced golf cars in sufficient quantities.[110] However, in the middle of the investigation, the Canadian producer ceased production and Treasury was left without a means of verifying the fair market value of the Polish manufacturer.[111] Since Poland was deemed a state-controlled economy country under its regulation, the Treasury could only use the United States' prices or the constructed value because no other countries manufactured the product.[112] The Polish manufacturers argued that exports are possible only where the producing country achieves cost savings relative to the importing nation, and that, therefore, use of the United States value would effectively preclude them from the United States' market.[113] The Poles were not producing for a home market rather it was primarily targeted for exports in the United States.[114] In response, the Treasury developed a new method for determining a constructed value based upon the surrogate country prices. The Treasury constructed a fair market value based on the Polish company's physical inputs valued at prices prevailing in Spain – a country determined by Treasury to be at a comparable level of economic development to Poland.[115]

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[110] Schwartz, op cit. p. 219.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] For the case study of Polish Golf Cars, *See* also Cuneo and Manuel, "Roadblock to Trade: The State-controlled Economy Issue in Antidumping Law Administration." *Fordham International Law Journal* 5, 1981; Horlick and Shuman, "Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws." *The International Lawyer* 18, no. 4, 1984; Judith H

The constructed value using surrogate country prices is otherwise known as the "factors of production method", whereby the amount of each factor input of the Polish manufacturer would be determined and the costs of each input would be taken from a market economy country. In the Trade Agreements Act of 1979, the Congress codified the factors of production approach as an alternative methodology to be used in state-controlled economy dumping cases when it was impossible to find an appropriate surrogate country.[116] After passing the Act, the Commerce issued the regulation outlining the hierarchy of methods for determining a foreign market value in investigations involving nonmarket economies.[117] The regulation provided that foreign market value should be determined in such order of investigation:

> '(1) according to home market prices of such or similar merchandise in a surrogate country; (2) the export price of such or similar merchandise shipped from a surrogate; (3) when actual or accurate prices are not available, the constructed value of such or similar merchandise in a surrogate country; and (4) the value in a surrogate country of the factors of production used in the state-controlled economy for such or similar merchandise.'[118]

However, this provision still maintained that the surrogate country's home market prices or export prices to third country were preferred methods for calculating a fair

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Bello, et al., Searching for "bubbles of Capitalism": Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies." *George Washington Journal of International Law and Economics* 25, no. 3, 1992.

[116] Trade Agreements Act of 1979, Pub.L. No. 96-39, 1979 US Code Cong. & Admin. News 93 Stat. 144, codified at 19 U.S.C. § 1677b(c)(1982).

[117] 19 C.F.R. § 353.8(a)-(c). Additionally, the 1979 Act removed the responsibility for making sales-less-than-fair-value determinations from the Department of Treasury and turned it over to the Department of Commerce, *See* also Laroski, Joseph A., Jr. "NMEs: A Love Story - Nonmarket and Market Economy Status under U.S. Antidumping Law." *Law and Policy in International Business* 30, no. 2, 1999, p. 373.

[118] Ibid.

market value. As the use of surrogate country method prevailed, it received harsh criticisms for being irrational and arbitrary.[119] The surrogate country approach often produced seemingly unpredictable and abusive dumping margins against state-controlled economy producer as it was evident in the *Electric Golf Cars* case from Poland.[120] Thus, the surrogate country method is significantly challenged in the Omnibus Trade and Competitiveness Act of 1988.

3-2-2. Determination of Chinese Economy in *Menthol* case

The *Natural Menthol* case was the first antidumping proceeding initiated by the United States against imports from China.[121] During the late 1970s, imports of natural menthol from China began increasing dramatically concurrently with declines in imports from other countries such as Brazil.[122] As a result, Haarmann & Reimer

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[119] S. 490. 100th Cong., 1st Sess. (1987). After 1987 Omnibus Trade Bill was vetoed by President Reagan, substantially similar bill was reintroduced and enacted in law as Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. It can be summarized as follows: The current antidumping duty law and procedures as they apply to nonmarket economies do not work well. The Commerce Department is frequently unable to find surrogate producers willing to cooperate in investigations by providing data. Therefore, it has had to develop fall-back methodologies. The dumping margins for a nonmarket economy country will vary widely depending on which methodology or surrogate country is used. As a result, a nonmarket economy country typically is unable to predict whether or not a particular U.S. price will be considered a dumped price, and is unable to structure its activities accordingly. In addition, an American industry faced with low-priced competition from a nonmarket producer is unable to determine whether the antidumping duty law would provide a remedy.

[120] Lantz, op cit. p. 1004.

[121] Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981), and 46 Fed. Reg. 24,614 (1981).

[122] Ibid.

corporation filed a petition against Chinese producers on June, 1980. After reviewing the petition, Commerce determined that there was sufficient evidence to initiate antidumping investigation and announced a notice of the initiation on July, 1980. Furthermore, the United States International Trade Commission (USITC) determined that an industry in the United States is being materially injured or is threatened with material injury, by imports of menthol from the People's Republic of China (PRC). The next year, however, the USITC reversed its decision and concluded that imports of menthol from China had neither caused nor threatened material injury to the United States industry, terminating the case thereafter.[123]

Although the case was ultimately withdrawn, it was the first time the Commerce Department had to determine the applicability of the state-controlled economy provision against Chinese product. The investigating authority assumed that the economy of China had a high degree of central planning and state control, yet Chinese manufacturers sought to alter that perception and to distinguish its case from the previous *Polish Golf Car* case. The Chinese respondents in the case, known as the China National Native Producer and Animal By-Products Import & Export Corporation (CNEC) filed a report asserting that the normal market economy methodology should be used to calculate the fair value of their merchandise. They argued that (1) the production and sale of menthol in China are based on market considerations; (2) the perception of China's economy as totally dominated by the

[123] Final Determination of Natural Menthol from the People's Republic of China, 46 fed. Reg. 31,796 (1981).

central government is inaccurate, particularly considering recent economic reforms; and (3) the agricultural sector in particular is subject to limited state influence with no state intervention in the production and pricing of nonessential products such as menthol.[124] The respondents tried to show that menthol industry is a market-oriented and free from government intervention. They argued that there was persuasive evidence showing that the purchases and sales of menthol in China are based essentially on market considerations.

However, the Commerce responded to the claims by reaffirming that the economy of the China is in fact a transitional economy in which the government still has considerable control over the composition of inputs and distribution of outputs. The Commerce acknowledged that purchases and sales of menthol in the PRC are essentially based on market considerations. Furthermore, it found that there appeared to be no government controls on the production of menthol or peppermint oil. However, the Commerce claimed that there are general limitations on the transferability of land and labor in the production process. It reached a conclusion that the home market prices for menthol could not be accepted as a measure of a fair market value not because of the presence or absence of direct controls over the production and distribution of menthol, but because of indirect government control pervading in producing agricultural products in general, including the menthol production. Thus, it made an affirmative conclusion that China's home market or

[124] Ibid.

export prices for natural menthol are not appropriate for use in valuation of a fair value, instead it decided to calculate a foreign market value on the basis of sales of natural menthol from a non-state-controlled economy country in consistent with precedent Treasury's practice.

On basis of the new Treasury regulation adopted in 1979, an appropriate "non-state-controlled economy country" had to be chosen which are: 1) at the level of economic development comparable to that of NME country, and 2) significant producer of comparable merchandise.[125] Furthermore, the economic development was determined by a reference to generally recognized criteria, including per capita gross national product and infrastructure development particularly in the industry producing such or similar merchandise.[126] Based on such guidelines, the Commerce had to choose one or more appropriate surrogate countries to make a fair value comparison.[127]

In practice, however, the Commerce enjoys a wide discretion in its surrogate country selection. One of the fundamental flaws of the surrogate country method is that the range of country selection is limited. Theoretically, the Commerce Department ought to find a competitive country that produces such or similar merchandise in market economy country that is at similar level of economic development to the nonmarket economy country and is a significant producer of merchandise with the exception of the United States. In the *natural menthol* case, available section was only

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[125] Trade Agreements Act of 1979, Pub.L. No. 96-39, 1979 US Code Cong. & Admin. News 93 Stat. 144, codified at 19 U.S.C. § 1677b(c)(1982).
[126] 19 C.F.R. § 53.7 (1979).
[127] Ibid.

Brazil, Japan and Paraguay.[128] However, the Commerce ultimately used the purchaser price from Paraguay to the United States during the period between January 1 through June 30, 1980.[129] It provided specific reasons from choosing Paraguay as a surrogate country. First, the level of economic development of Paraguay appears to be closer to that of China relatively than the levels of other major producers of natural menthol – as measured by per capita gross national product. Second, it is the only major non-state-controlled country which domestically produces all of its own raw material – the peppermint – for production of natural menthol.[130] However, this decision was quite controversial during the time of investigation because the economy of Paraguay had been also influenced by state-controls system having a minimum export price set by the central bank, and a dual exchange rate system.[131] While the Commerce ultimately made an adjustment for Paraguay's export tax system, it ignored other adjustments that would have insured greater comparability between Paraguay and China.[132]

3-2-3. Development of the SCE Provisions in *Candles* case

In between 1979 and 1988, the Commerce refined and developed its administrative practice of applying state-controlled economy provision by establishing

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[128] Final Determination of Natural Menthol from the People's Republic of China, 46 fed. Reg. 31,796 (1981).
[129] Ibid.
[130] Ibid.
[131] Cuneo and Manuel, op cit. p. 297-301.
[132] Ibid.

the four criteria for determination of a state-controlled economy.[133] In the *Candles* case, the Commerce Department had to refine the definition of state-controlled economy in opposition to Chinese manufacturers' persistent allegation that its industry is independent from state-control and that it had successfully achieved major reform process. Furthermore, the Chinese respondents had claimed that the section 773(c) of the state-controlled economy provision requires examination not only of an economy in general but also of an industry in particular.[134]

In response to these allegations, the Commerce Department specified the definition of so-called 'state-controlled economy' within the meaning of the section 773(c) by establishing the four criteria, which among other things includes: (1) the degree of centralized government ownership of the means of production; (2) the degree of centralized government control over allocation of resources and inputs; (3) the degree of centralized government control over outputs and, (4) the relative convertibility of the country's currency and the degree of government control over trade.[135]

Based on the above criteria, the Commerce were required to provide explicit basis for a state-controlled economy determination in antidumping proceeding. Beginning with the case of *Candles,* the Commerce provided sufficient volume of

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[133] Petroleum Wax Candles from the People's Republic of China, Preliminary Determination of Sales at Less than Fair Value, 51 Fed. Reg. 6016 (1986).
[134] Ibid.

[135] Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 25,085 (1986).

evidences that the major input for producing candles, which is a paraffin wax, was classified as a quota product at the time of investigation.[136] They found that it is produced by state-owned petroleum firms under centrally set prices and quota. Thus, as required by the second factor of the criteria set above, the Commerce had concluded that the Chinese economy, having the quota system for raw materials as well as other inputs for producing candles, and controlling the allocation of candle products, is ought to be treated as a state-controlled country for the purpose of this investigation.[137] Later in the *Headwear* case, the Commerce continued to use the criteria set up in the *Candles* case to reconfirm that the economy of China is a state-controlled within the meaning of section 773.[138]

3.3. Defining the Nonmarket Economy Provision in 1988

In the Omnibus Trade and Competitiveness Act of 1988, the Commerce restructured its administrative practices for determination of a state-controlled economy in response to persistent challenges raised by Chinese respondents regarding the application of a state-controlled economy provision within the meaning of section 773(c). In the *Natural Menthol* case, the investigating authority for the first time determined that the economy of China was a state-controlled and thus, it preferred to

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[136] Ibid.
[137] Ibid.
[138] Preliminary Determination of Sales at Less Than Fair Value; Certain Headwear from the People's Republic of China, 53 Fed. Reg. 45138 (1988).

use a surrogate country sales price or an export price into the third country as an alternative methodology for calculating the fair market value of the subject merchandise. In *Candles* case, the Commerce refined the scope of a SCE determination by establishing the four factor criteria. Furthermore, the Commerce began to provide justification for its determination of Chinese economy as a state-controlled.

However, the administrative practice of applying the state-controlled economy provision received harsh criticisms both internally and externally. One of the major problems for a state-controlled economy determination came from irrationality of the surrogate country method. The systematic design of the surrogate country method could have easily produced unpredictable and arbitrary results.[139] The fundamental problem with the method was that neither a petitioner nor a potential respondent could determine in advance how Commerce would apply the ambiguous concept of "comparable economy" and select an appropriate surrogate country.[140] Despite the importance of the issue as a threshold matter, neither the statute nor regulations provided any guidance as to how to choose a surrogate market economy with a level of comparable economy developed and significantly manufactures the

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[139] For analysis of the surrogate country method, *See* Horlick and Shuman, "Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws." *The International Lawyer* 18, no. 4, 1984; Jeffrey Neeley, "Nonmarket Economy Import Regulation: From Bad to Worse." *Law and Policy in International Business* 20, no. 3, 1989; Bello, et al., "Searching for "bubbles of Capitalism": Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies." *George Washington Journal of International Law and Economics* 25, no. 3, 1992.

[140] Bello et al., op cit. p. 680-686.

merchandise under the investigation. Over the time, these problems became a significant administrative problem in practice.

With regards to dumping cases against Chinese imports between 1985-1988, the Commerce Department based a fair market value determination on sales price into the United States because it was impossible to use surrogate country method. For example, in *Candles* case, the Commerce Department preliminarily determined that Egypt, India, Indonesia, Morocco, Pakistan, Philippines, and Thailand were at a level of economic development comparable to China and it sent out questionnaire to well-known manufacturers of petroleum wax candles in each of these countries.[141] However, none of the manufacturers has replied to the questionnaire on time for preliminary determination.[142] Therefore, the Commerce based the foreign market value on the prices of imports into the United States from Guinea and Malaysia on the basis of the average F.O.B. values of candles imported into the United States from these two countries during the six-month period of investigation as complied by the Bureau of Census.[143] In addition, some adjustments are made as to cost of material supplied by purchases of the Chinese candles, where applicable.[144] Similarly in *Carbon Steel Pipes and Tubes* case,[145] the investigating authority could not use

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[141] Petroleum Wax Candles from the People's Republic of China, Preliminary Determination of Sales at Less than Fair Value, 51 Fed. Reg. 6016 (1986).
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the People's Republic of China, Preliminary Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 15,938 (1986).

surrogate country selection because none of them responded in timely manner. Thus, it had to resort to the price of imports of the same kind of merchandise into the United States. Of the countries exporting pipe and tube to the United States, it chose weighted average C&F price from Argentina for export to unrelated purchasers in the United States.[146] It reasoned that Argentina was chosen since it was at the most comparable level of economic development to China at that time.[147]

Although the investigating authority came up with the selection of surrogate countries, in certain cases, the use of such information was impossible because of the following reasons: 1) lack of suitable information from the surrogate, 2) its unwillingness to cooperate in the investigation, 3) late submission of information by surrogate companies. The surrogate country method involves the two-step process: first, the government of the country chosen as a surrogate must give permission to the United States government to approach that country' producers;[148] and second, the producers themselves must be willing to cooperate.[149] In the cases involving Chinese imports before 1988, several countries either refused to allow the investigating authority such access to their producers or companies themselves did not cooperate in a proper manner during the investigation. In these circumstances, the Commerce Department had no choice but to rely on the United States' prices.

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[146] Ibid.
[147] Ibid.
[148] Horlick and Shuman, op cit. p. 821.
[149] Ibid.

To address technical problems with the surrogate country method coupled with rising complaints from NME producers regarding the abusive dumping margin calculating methodology, the Congress incorporated new provisions in the Omnibus Trade and Competitiveness Act of 1988.[150] The provisions under the Act continues to provide a basis for the Commerce to make a determination of so-called 'nonmarket economy country' and calculate fair market value primarily based on the factor of production method over the previous surrogate country method.

3-3-1. Developments in the Omnibus Trade and Competitiveness Act of 1988

The importance of the Omnibus Trade and Competitiveness Act of 1988 is twofold. First, the provision included the first legal definition of nonmarket economy to be determined under the national antidumping law.[151] The regulation provides that:

> '(18) Nonmarket Economy Country-
> (A) In general.-The Term "nonmarket economy country" means any foreign country that the administering authority determine does not operate on market principles of cost of pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.
> (B) Factors To Be Considered- In making determinations under subparagraph (A) the administering authority shall take into account-
> (i) the extent to which the currency of the foreign country is convertible into the currency of other countries,
> (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,
> (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in foreign country,

[150] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C.).
[151] Lantz, op cit. p. 1004.

> (iv) the extent of government ownership or control of the means of production,
> (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
> (vi) such other factors as the administering authority considers appropriate.'[152]

Furthermore, according to the regulation, the Commerce's determination of a country as a NME would not be judicially reviewable and the NME status remains effect until otherwise it is revoked.[153] In practice, the commerce department must determine whether the economy of a country from which the merchandise under investigation is exported is a nonmarket economy.[154] Prior to 1988, the Commerce routinely determined with little explanation that the economy from which the subject goods were exported was indeed a state-controlled, and this inquiry was not mandatory by any statutory or regulatory criteria.[155] However, since the definition of 'nonmarket economy' was included in the statutory language, Commerce Department had to justify the practice of determining a NME by a statutory regulation.

Secondly, the factors of production method became the preferred method over the use of surrogate country's price to a third country or the United States.[156] It also demoted to second preference the previously preferred methodology for relying on prices of such or similar merchandise sold by a market-oriented surrogate country to a

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[152] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C.).
[153] 19 U.S.C. § 1677(18).
[154] Bello et al. op cit. p. 687.
[155] Ibid.
[156] Ibid.

third country or the United States.[157] Nevertheless, if the administering authority finds that an available information is inadequate for purposes of determining a foreign market value, it may determine a foreign market value on basis of the price from one or more market economy surrogate country that are: (1) at a level of economic development comparable to that of the nonmarket economy countries, and (2) significant producers of comparable merchandise.[158]

Based on this regulation, the nonmarket economy status of China became officially irrevocable under the antidumping statute. Although the United States does not keep a list of countries designated as a nonmarket economy, countries that are currently treated as one include: China, Vietnam, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.[159] In the early 1990s, most of the Eastern European countries including Poland, and former

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[157] Ibid, p.683.

[158] 19 U.S.C. § 1677(18):
'(c) Nonmarket Economy Countries-
(1) in General.-If-
(A) the merchandise under investigation is exported from a nonmarket economy country, and
(B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a), the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factor of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, covering, and other expenses, as required by subsection (e). Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market country or countries considered to be appropriate to the administering authority.'

[159] Watson, K. William. "Will Nonmarket Economy Methodology Go Quietly into the Night?: US Antidumping Policy Toward China after 2016." (2014)., p. 5.

Soviet Union have graduated from the nonmarket economy status.[160] The four countries designated as a nonmarket economy – Armenia, Georgia, Kyrgyzstan, and Moldova – are members of the WTO and do not have special provisions in their accession protocol allowing the use of NME-specific methodology in antidumping proceedings.[161] Chinese government, on behalf of the domestic industry, had contested its NME status in the *Sparklers* case in 1990[162] and again in 2006,[163] yet its status remained unchanged.

While the United States' antidumping statute includes a law governing nonmarket economy country, it does not have any regulation regarding designation of a market economy country. The graduation process of nonmarket economy country and the recognition of market economy status had rarely taken place without clear explanations. Thus, graduating from a legal concept of nonmarket economy country raises the fundamental question of: on what ground is a country ought to receive a market economy status? Chinese respondents had raised in several antidumping proceedings that the United States should revise its nonmarket economy status or otherwise partially recognize its market reform in certain sector of the economy. In

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[160] Final Determination of sales at less than fair value: Certain Cut-to-Length Carbon Steel Plate From Poland, 58 Fed. Reg. 37,250 (1993); Decision Memorandum on Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law (International Trade Administration June 6, 2002).

[161] William, op cit. p. 5.

[162] Initiation of Antidumping Duty Investigation; Sparklers from the People's Republic of China, 55 Fed. Reg. 31,088 (1990).

[163] Import Administration Memorandum, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China – China's Status as a Non-market Economy, NME memo 77 (2006).

response, the Commerce developed a number of systematic mechanisms to test market influence in Chinese industry or in individual firm under the umbrella of nonmarket economy status. Unfortunately, whether such developments had positively attributed to China's graduating process from nonmarket economy status is still quite questionable.

3.4. New Parameters in Chinese Cases after 1988

3-4-1. The Separate Rate Test in Sparklers case

Chinese government, on behalf of the China Chamber of Commerce of Imports and Exporters of Foodstuffs, Native Produce and Animal-By Products, for the first time contested its NME status. It alleged that the Commerce should revoke China's NME status mandated under the Omnibus Trade and Competitiveness Act of 1988. However, the Commerce Department determined that NME treatment is appropriate because Chinese government's submission did not contain any documents or evidence substantiating its claim.[164]

While respondents of China have raised serious concerns that economic reform should entitle them to normal antidumping treatment, none of the arguments persuaded Commerce to give market economy status to China. In *Headwear* case, Commerce had positive views on altering its NME methodology on China should it

[164] Ibid.

accomplish market economic reforms.[165] However, in the beginning of the investigation in *Sparklers* case, the Commerce reaffirmed that NME treatment is appropriate for this investigation. As a result, Commerce determined a fair market value based on the factor of production method. Accordingly, it preliminarily determined that all manufacturers, producers, and exporters are assigned single weighted average dumping margin of 103.71 percent.[166]

However, in final determination of antidumping investigation, respondents again argued that individual companies should be assigned separate dumping margins based on producer's actual acquisition price because they are legally and factually independent entities from central control.[167] To show absence of government intervention in certain company, Chinese producers provided evidence on the following company information: 1) each company's possession of an "enterprise legal person" license: which requires the bearer company to maintain its own accounts and be responsible for its own profits and losses; 2) various official and unofficial explanations that the companies have been separated from the national head office which is now unable to exert control over its former local offices; 3) that there is no evidence in the record indicating that the sparkler sellers are subject to centralized

[165] Final Determination of Sales at Less Than Fair Value, Certain Headwear from the People's Republic of China, 54 Fed. Reg. 11,983, (1989).
[166] Final Determination of Sales at Less Than Fair Value, Certain Headwear from the People's Republic of China, 54 Fed. Reg. 11,983, (1989).
[167] Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 Fed. Reg. 20,589 (1991).

government control; 4) that there is no evidence of coordination among the companies on such matters as price setting, market division and production practices.[168]

Commerce examined available evidences and reached a conclusion that certain company in nonmarket economy country can actually be entitled to a separate, company-specific dumping margin should they demonstrate an absence of government control both *de jure* and *de facto* with respect to subject merchandise.[169] It also concluded that finding of *de jure* absence of government control includes: 1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government control of companies.[170] And it listed that *de facto* absence of central government control with respect to exports is based on two prerequisites: (1) whether each exporter sets its own export prices independently on the government and other exporters; and (2) whether each exporter can keep the proceeds from its sales.[171]

Since certain companies from China provided sufficient evidence to meet all the requirements set above, the Commerce valued company-specific dumping margin by constructing the fair market value using surrogate country's prices of raw materials. It also outlined order of preference of using surrogate values: (1) prices paid by the NME manufacturer for items imported from a market economy; (2) prices in the

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[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.

primary surrogate country of domestically produced or imported materials; (3) prices in one or more secondary surrogate countries reported by the industry producing subject merchandise in the secondary country or countries; (4) prices in one or more secondary surrogate countries from sources other than the industry producing the subject merchandise.[172] Based on the above guideline, individual antidumping duty order was calculated for those who passed the separate rate test which is summarized in Table 2.

Table 2. Antidumping Duty Order in *Sparklers from China* case[173]

Chinese Respondents	**Margin Percentage**
Guangxi Native Produce Import & Export Corporation, Behai Fire Works and Firecrackers Branch	1.64
Hunan Provincial Firecrackers & Fireworks Import & Export (Holding) Corporation	93.54
Jiangxi Native Produce Import & Export Corporation, Guangzhou Fireworks Company	65.78
All Others	75.88

The Commerce generally begins with a rebuttable presumption that all companies within the nonmarket economy country are operating in a single unit of state-controlled and, thus, should receive a single antidumping duty rate.[174] It had been an accepted administrative practice for nonmarket economy country dumping cases. However, beginning with the *Sparkler* case, the United States started to assign individual dumping margins should a company passes so-called the separate rate test.

[172] Ibid.
[173] Final Antidumping Duty Order: Sparklers from the People's Republic of China, 56 Fed. Reg. 27,946 (1991).
[174] Enforcement and Compliance 2015 Antidumping Manual Chp. 10.

Considering the fact that a single country-wide antidumping duty of 103.71 percent was assigned in the preliminary determination of the *Sparklers* case,[175] it is noteworthy that three companies received an individual antidumping duty and among them, two companies received lower average antidumping margin than the 'all other rate' assigned.[176]

However, the separate rate test has been criticized for attaching a conditionality for Chinese producers, which is to prove both *de jure* and *de facto* absence of government control. This had placed an additional burden for Chinese producers,[177] including its responsibility to provide cost information about the production of subject merchandise. In addition, the separate rate test had been devised in order to allow independent companies to escape from categorical nonmarket economy treatment,[178] but in effect the test established another hurdle before graduating from nonmarket economy status.

3-4-2. Bubble of Capitalism in Fans and Lug Nuts case

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[175] Final Determination of Sales at Less Than Fair Value, Certain Headwear from the People's Republic of China, 54 Fed. Reg. 11,983, (1989).

[176] However, Hunan for example received higher antidumping margin than rate assigned for all others. This occurred because the Commerce was unable to determine the cost of processed raw material before it was incorporated into sparklers. Thus, instead of using the import prices paid by Hunan for raw material inputs, the Commerce used the price reported by the sparkler industry in the Philippines. As a result, it received the highest dumping margin of 93.54 percent out of all the rates assigned in this investigation.

[177] Alagiri, Priya. "Reform, Reality, and Recognition: Reassessing US Antidumping Policy Toward China." *Law & Pol'y Int'l Bus.*26 (1994): 1061.

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Since the separate rate test has been introduced in the *Sparklers* case, Chinese producers further requested that actual acquisition prices of inputs from Chinese producer should be accepted if certain company is found to be market-oriented. The Department addressed this claims by developing so-called "bubble of capitalism test", which was first introduced in preliminary determination of *Fans* case,[179] and then affirmed in final determination of *Lug Nuts* case.[180] The institution of bubble of capitalism test implies partial acknowledgement of market progress in specific sector of the economy within state-control by accepting acquisition price from Chinese producers. However, the decision to accept Chinese actual acquisition price was heavily challenged and thus, the test was later revised into a new standard, known as market-oriented industry test. As a result of such development, the focus of interest had been narrowed from finding existence of market forces in China's general economy to specific industry in question.

Preliminary Determination of Oscillating and Ceiling Fans

The main issue raised by Chinese respondents in preliminary determination concerned whether it is possible to find individual firm (or even industrial sector) producing subject merchandise sufficiently free of state-control to allow calculating of

[179] Preliminary Determinations of Sales at less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. 25,664, (1991).
[180] Preliminary Determination of Sales at Less than Fair Value: Chrome-plated Lug Nuts from the People's Republic of China, 56 Fed. Reg. 15,857, (1991).

fair market value based on market economy methodologies, i.e., home market sales, third country sales, or constructed value, respectively.[181] The producers of fans provided sufficient evidences to show that their prices and cost of production are not distorted by the state.[182] The outlined evidences included detailed company information on sources of inputs, management structure, and production cost. Regardless of the evidences provides, the Commerce Department made an affirmative determination that the fan sector is state-controlled for purpose of this investigation.[183]

In addition to its decision, the Commerce further stated that it may consider using the price of inputs at actual acquisition price reported by the respondents if it proves adequate evidences to show existence of market forces in their associated company. This determination, however, opened up new possibility for producers receiving nonmarket economy country treatment. If only the respondent can prove that all of the prices of the NME inputs are purchased from market economy country, the Commerce may use actual prices and costs from China. However, the test is otherwise known as "all or nothing" standard, which means only all of the prices of the NME inputs must be market driven otherwise no bubble exists in the market. In the *fans* case, the Commerce found state intervention in labor structure of fan producing companies and thereby, it valued factor of production using surrogate values from Pakistan and India.[184]

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[181] Preliminary Determinations of Sales at less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. 25,664, (1991).
[182] Ibid.
[183] Ibid.
[184] Final Determination of Sales at less Than Fair Value: Oscillating Fans and Ceiling Fans

Lug Nuts

Consistent to its decision regarding the bubble of capitalism test, the Commerce examined whether the chrome-plated lug nut sector is sufficiently market oriented.[185] The Commerce stated that: "In order for us to find 'a bubble of capitalism' and to treat NME producer as if it were a market economy producer despite the fact that the economy in which it operates is nonmarket, we will have to be persuaded that all prices and costs faced by the individual producer are market determined. Alternatively, in those situations were some not all, inputs are market-determined, we will rely on the surrogate values for those inputs, but will utilize all NME input costs that are determined to be market driven."[186] In essence, the Commerce acknowledged for the first time, the possibility for accepting actual information acquired from Chinese companies in an otherwise nonmarket economy.

Amendment to Final Lug Nuts Determination

In *Fans* case, the United States has for the first-time permitted calculation of foreign market value based on the NME exporter's prices or costs, despite the fact that

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from the People's Republic of China, 56 Fed. Reg. 55,271 (1991).
[185] Preliminary Determination of Sales at Less than Fair Value: Chrome-plated Lug Nuts from the People's Republic of China, 56 Fed. Reg. 15,857, (1991).
[186] Ibid.

the country is considered an NME. In this case, the Commerce articulated a test for determining whether the producer in question operated in a market environment yet it required 100 percent of the producer's inputs be purchased at market-determined prices.

Soon after the final determination on Lug Nut had been published in September, 1991, the Commerce's decision and its new 'bubble of capitalism' test were challenged by petitioners in the US Court of International Trade.[187] On October 6, 1994, Kenneth Freedman and Consolidated Industrial Automotive filed a petition against the Department of commerce for their determination against dumping of lug nuts at less than fair value. Department's initiation of countervailing duty investigation against Chinese imports.[188] In these cases, the Department focused on whether a country with an economy in transition can reasonably be determined to provide a "bounty" or a "grant" under the United States' countervailing duty law.[189]

Commerce in return, sought a voluntary remand and decided that there was a significant flaw in the bubble of capitalism test.[190] As a result, Commerce decided to abandon its test that used domestic source input costs shown to be market-driven to

[187] Consolidated International Automotive, Inc. v. United States, Court No. 91-09-00700.
[188] Initiation of Countervailing Duty Investigation: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. 57616 (1992); Initiation of Countervailing Duty Investigation of Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China; 57 Fed. Reg. 877 (1992).
[189] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).
[190] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).

calculate a fair market value. Furthermore, the Commerce devised an alternative method to test existence of market forces in a nonmarket economy country known as the Market-Oriented Industry (MOI) test. In determining whether a market-oriented industry exists, the Department established factors to be considered which include, but are not limited to:

1) For merchandise under investigation, there must be virtually no government involvement in setting prices or amounts to be produced. For example, state-required production or allocation of production of the merchandise, whether for export or domestic consumption in the nonmarket economy country would be an almost insuperable barrier to finding a market-oriented industry.
2) The industry producing the merchandise under investigation should be characterized by private of collective ownership. There may be state-owned enterprises in the industry but substantial state ownership would weigh heavily against finding a market-oriented industry.
3) Market-determined prices must be paid for all significant inputs, whether material or non-material (e.g., labor and overhead), and for an all but insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation. For example, an input price will not be considered market-determined if the producers of the merchandise under investigation pay a state-set price for the input or Id. any state-required production in the industry producing the input, the share of state-required production must be insignificant.[191]

It also provides that "if these conditions are not met, the producers of the merchandise under investigation will be treated as nonmarket economy producers and the foreign market value will be calculated in accordance with section 773(c)(3)[192] or 773(c)(4)."[193]

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[191] Ibid.

[192] Section 773(c)(3) provides that third country sales will be used for calculating normal value if the particular market situation in the exporting country does not proper comparison with the export price or constructed export price.

[193] Section 773(c)(4) stipulates the use of constructed value. "If the administering authority

Accordingly, Commerce revised its decision in Lug nut case by reexamining lug nut industry based on the new standard of market-oriented industry test. In so doing, the investigating authority has found significant government intervention in purchases of significant input – i.e., steel.[194] Therefore, it had to revalue the steel and chemical inputs used in the production of chrome-plated lug nuts relying on surrogate country prices.[195]

After 1988, the Commerce Department devised new methodologies for acknowledging or partially acknowledging China's on-going market reform process. In *Sparklers* case, Commerce developed the separate rate test for Chinese producers to receive individually determined antidumping duty rate and to rescue them from receiving a country-wide antidumping margin. Commerce established 'bubble of capitalism' test to acknowledge relinquished Chinese prices and costs for price comparability in dumping investigation. However, this determination was later reversed and refined into new methodology known as the MOI test. Since the MOI test has been established in the *Amendment to Lug Nut* case, several Chinese industries strived to receive market economy status within their industry[196] yet so far none of

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determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(I), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e)."

[194] Ibid.

[195] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).

[196] Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China, 57 Fed. Reg. 21,058, (1992); Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the People's Republic of

them successfully passed the test. Therefore, instead of brining greater accuracy, fairness and reliability in determination of fair market value in nonmarket antidumping investigations, the new parameters administered by the Commerce Department without any legal codification seemingly created greater unpredictability for both petitioner and respondent. The next chapter will analyze why antidumping calculating methodologies and the manner in which they are applied by the investigating authority can create unpredictability and confusion for both parties.

China, 57 Fed. Reg. 9,409, (1992); Preliminary Determination of Sales at Less Than Fair Value, Helical Spring Lockwashers From the People's Republic of China, 58 Fed. Reg. 26112, (1993); Preliminary Determination of Sales at Less Than Fair Value, Silicon Carbide From the People's Republic of China, 58 Fed. Reg. 64,549, (1993); Preliminary Determination of Sales at Less Than Fair Value, Sebacic Acid From the People's Republic of China, 59 Fed. Reg. 3, (1993); Preliminary Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China, 59 Fed. Reg. 120, (1994); Preliminary Determination of Sales at Less Than Fair Value, Freshwater Crawfish Tail Meat From the People's Republic of China, 62 Fed. Reg. 58, (1997); Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms From the People's Republic of China, 63 Fed. Reg. 150, (1998); Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594, (2004); Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313, (2004).

Chapter IV. Implications of China's NME Status under the United States' Antidumping Laws

When China joined the WTO in 2001, it agreed to accept special provisions on how other WTO members can treat its exports as part of their antidumping investigations. More specifically, section 15 of its WTO accession protocol stipulates that importing WTO members may use "a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."[197] Such regulation has been included in the accession protocols of only very few countries, such as China and Vietnam.[198] Furthermore, it has been used as a basis for importing countries to ignore the prices and costs in those countries . Furthermore, the ambiguity arising from interpretation of the term 'strict comparison' ultimately leads to the application of diverse antidumping calculating methodologies.

The United States has codified the practice of using an alternative methodology when calculating dumping from state-controlled economies since 1979 and articulated its definition of a nonmarket economy in the Omnibus Trade and

[197] China's WTO Accession Protocol, Section 15(a)(ii).
[198] WTO, *Accession of the People's Republic of China*, WT/L/432, adopted 23 November 2001; WTO, *Report of the Working Party on the Accession of Vietnam*, WT/ACC/VNM/48, adopted 27 October 2006.

Competitiveness Act of 1988. Further technical developments have been achieved to allow independent companies to vindicate their absence from government control. The nonmarket economy status of China implies the following consequences. First, once the investigating authority determines that a country is a nonmarket economy, its status cannot be judicially renewable unless it is otherwise revoked.[199] Second, the practice of not using the prices and costs provided by the producers in a nonmarket economy country when calculating normal value of subject merchandise became legally justifiable under the national antidumping statute.

Unfortunately, the application of nonmarket economy status in practice has had a direct effect on Chinese manufacturers. Most evidently, the burden to prove that market conditions prevail in producing the product with regards to manufacture, production and sale rests on Chinese producers.[200] Even more, the process to show the absence of government control and the existence of market forces had placed additional burden on them.[201] In practice, the US investigating authority begins an antidumping investigation with the assumption that all exporters within the country are subject to governmental control and assign a single rate to all exporters producing the same merchandise known as the NME-wide rate.[202] In order to rebut the single rate

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[199] 19 U.S.C. § 1677(18).
[200] China's WTO Accession Protocol, Section 15(a)(ii).
[201] For development process of separate rate test, bubble of capitalism, and market-oriented industry test, *See* Chapter 2(4) New Parameters in Chinese Cases after 1988 of this paper.
[202] The Antidumping Manual states: In the proceedings involving NME countries, the [USDOC] begins with a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate)….Under the [USDOC's] current policy, all exporters seeking a separate rate in an investigation/review must complete a separate rate

presumption, an individual exporter has to prove both the absence of governmental control and the existence of market forces in their sector either through the "Market-Oriented Industry Test" or the "Separate Rate Test". Otherwise, the investigating authority would apply the highest margin calculated during the investigation at a single rate.[203] Systematically, Chinese producers are in a difficult position to prove their independence from the government by applying either to the separate rate test or the market-oriented test, although it is seemingly burdensome.

In the past, many scholars have sought to trace the origins and evolutionary process of nonmarket economy provision under the United States' antidumping law. Previous studies regarding the origins of nonmarket economy provision provides an understanding of the rationale behind separating state-controlled economies from market economies when it comes to calculating a fair market value.[204] Furthermore, the evolutionary process of nonmarket economy provision provides detailed knowledge for understanding administrative difficulties in dealing with dumping from economies that are not determined by market forces.[205] However, the treatment of the

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application. (Antidumping Manual, Chapter 10, (Exhibit CHN-23), pp. 3 and 5).

[203]The Antidumping Manual states: In accordance with our standard practice, as adverse facts available, we are assigning as the PRC-wide rate the higher of: (1) The highest margin stated in the notice of initiation; or (2) the margin calculated for the investigated company.

[204] For detailed history of emergence of nonmarket economy issue in GATT, *See* Kostecki, M. M. *East-West Trade and the GATT System*, St. Martin's Press for the Trade Policy Research Centre:London, 1979; Grzybowski, K. "Socialist Countries in GATT." *The American Journal of Comparative Law* 28, no. 4, 1980; Patterson, Eliza R. "Improving GATT rules for nonmarket economies." *J. World Trade L.* 20, 1986; Snyder, Francis. "The Origins of the 'Nonmarket Economy': Ideas, Pluralism & Power in EC Anti-dumping Law about China." *European Law Journal* 7, no. 4, 2001; Polouektov, Alexander. "Non-market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations." *Journal of World Trade* 34, no. 1, 2000.

[205] For detailed analysis of the United States regulations governing dumping from state-

issue of nonmarket economy countries is being revisited in the global trading system because it presents many legal and practical challenges, particularly for China.[206]

In sum, this chapter aims to understand what lies ahead by analyzing the lessons from the past. The purpose of this chapter is to investigate the legal and administrative challenges to China's nonmarket economy status by considering all of the antidumping investigations initiated by the United States against China between 1980 and 2016. Above all, it argues that the blunt definition of nonmarket economy country within the multilateral trading system has caused, and will continue to cause, diverse interpretational challenges when it comes to acknowledging or partially acknowledging China's ongoing market reform. Second, the case studies show that the

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controlled economies, *See* Schwartz, Louis B. "Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations." *University of Pennsylvania Law Review* 128, no. 1, 1979; Cuneo, Donald L., and Manuel, Charles B., Jr. "Roadblock to Trade: The State-controlled Economy Issue in Antidumping Law Administration." *Fordham International Law Journal*5, no. 2, 1982; Horlick, Gary N., and Shannon S. Shuman. "Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws." *The International Lawyer* 18, no. 4, 1984; Brashear, Lydia. "Factors or Prices? An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies." *American University Journal of International Law and Policy* 5, no. 3, 1990; Bello, Judith H., Holmer, Alan F., and Preiss, Jeremy O. "Searching for "bubbles of Capitalism": Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies." *George Washington Journal of International Law and Economics* 25, no. 3, 1992; Lantz, Robert H. "Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Antidumping and Countervailing Duty Laws." *Am. UJ Int'l L. & Pol'y* 10 1994; Laroski, Joseph A., Jr. "NMEs: A Love Story - Nonmarket and Market Economy Status under U.S. Antidumping Law." *Law and Policy in International Business* 30, no. 2, 1999.

[206] For legal analysis of China's nonmarket status in the WTO, *See* Qin, Julia Ya Y. ""WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol." *Journal of World Trade* 37, no. 3, 2003; Tietje, Christian, and K. Nowort. "Myth or reality? Chinas market economy status under WTO anti-dumping law after 2016." *Policy Papers on Transnational Economic Law* 34, 2011; Smith, Jane M. "US trade remedy laws and nonmarket economies: A legal overview." In *Congressional Research Service Report for Congress*, 2013.

only mechanism for market economy treatment available to Chinese producers under the United States' antidumping law is like going through the eye of a needle. Third, the last resort for Chinese manufacturers, which is to go through the separate rate test entails uncertainty and unpredictability in determining the end result of an antidumping proceeding due to numerous administrative hurdles applicable only to a nonmarket economy country.

4.1. Fundamental Legal Flaws in the Nonmarket Economy Definition

The main reason why the concept of a nonmarket economy has received a lot of criticism for being ambiguous and irrational is that it has been neither properly defined nor addressed in the GATT/WTO. The idea of regulating state-controlled economies originates in large part from the United States and its allies after World War II, all of whom shared the view that the gradual reduction of trade barriers and non-discrimination are imperative to maintaining peace and stability in the world economic system.[207] Therefore, the United States, the lead proponent of the International Trade Organization, put forward, at the first session of the UN ECOSOC, regulation concerning factors that impeded trade liberalization, which encompassed state-trading activities.[208] Thus, the founding fathers of the multilateral trade organization presumably considered state-led trading as an aberration and sought to significantly

[207] Jackson, op cit. p. 9.
[208] Snyder, op cit. p. 378.

regulate countries in which the state controls economic activity.[209] However, it was also considered that the state trading regulations included in the Havana Charter ought to be pruned away because at that time transitional economies were considered a temporary phenomenon of the post-war period.[210]

Therefore, initially the GATT Article VI was applied unilaterally regardless of the type of economic system of the contracting parties. However, the need for a bifurcated approach was first raised by Czechoslovakia, when it questioned the applicability of the GATT Article VI on a state-controlled economies in the 1954-55 GATT Review Session.[211] Thus, the interpretative note was added to the first paragraph of Article VI, which for the first time acknowledged that it is inappropriate to apply existing antidumping rules to a country which has 'a complete or substantially complete monopoly of its trade and all domestic prices are fixed by the State.'[212] At the time, this provision was a mere statement of facts and did not seem to immediately threaten Members' interests.[213] This provision became a part of Article 2.7 of the 1994 WTO Agreement on Implementation of Article VI, which stipulates that 'Article 2 is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to GATT 1994.'[214] Unfortunately, nobody seemed to understand that the simple recognition of "inappropriateness" of a strict comparison with domestic prices

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[209] Polouektov, op cit. p. 5.
[210] Ibid.
[211] GATT, *Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995),* volume 1, p. 228.
[212] Ibid.
[213] Polouektov, op cit. p. 8.
[214] Article 2.7 of Agreement on Implementation of Article VI of the GATT 1994.

in state-trading countries could introduce enormous legal maneuverability and diverse interpretations.

One of the major challenges to the multilateral trading system is that there are no specific guidelines on how to interpret and recognize a country which satisfies both factors: 'a complete or substantially complete monopoly of its trade' and 'where all domestic prices are fixed by the State.' The two criteria for determining nonmarket economy country status, contained within Article 2.7 of the Uruguay Round Antidumping Agreement, have remained in effect. This provision is applicable to all countries which become members of the WTO.

Through the history of multilateral trade negotiations, the GATT contracting parties have been less concerned with defining nonmarket economy countries, while being more focused on how to calculate dumping margins when dumping has occurred involving such countries. Article 2(d) of the Kennedy Round Antidumping Code provides that a proper price comparison may not be feasible between the normal value and the export price either because: 1) there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or 2) because of the particular market situation.[215] In such cases, the margin of dumping is calculated using one of two methods: 1) with the price of the like product when exported to any third country, or 2) with the cost of production in the country of origin plus a

[215] Anti-Dumping Code, art. 2(d) (General Agreement on Tariffs and Trade, April 1968)(BISD 15S/4-35).

reasonable amount for administrative, selling or any other costs and for profit.[216] In addition, Article 2(g) specified that this Article is without prejudice to the interpretative note. These articles do not necessarily address the fundamental question of whether it is possible to use sales prices in a state-controlled economy for the determination of normal value. Instead, the focus has shifted to a methodological issue of how to calculate dumping margins in the case that a strict price comparison may not be feasible.

In addition, the Tokyo Round Subsides Code further elaborated rules on so-called 'alternative methodologies' for determining dumping margins. Article 15 of the Code provides that the margin of dumping can be made by comparison of the export price with: (a) the price at which a like product of a country other than the importing signatory, or those mentioned above is sold, or (b) the constructed value of a like product in a country other than the importing signatory or those mentioned above.[217] In other words, this provision allows dumping margins to be calculated against a country which has 'a complete or substantially complete monopoly of its trade' and 'where all prices are fixed by the State' – in this case the importing country may compare the export price with 1) the price of a like product sold in market economy country except the importing country, or 2) the construct value of a like product using values from any market economy country other than the importing country. This

[216] Ibid.
[217] GATT Code on Subsidies and Countervailing Duties (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade).

provision allows the importing country to use surrogate country values using real prices or constructed values. However, Article 15 of the Tokyo Round Subsidies Code did not draw any attention from the GATT contracting parties at the time,[218] and was consequently removed from the final draft of the Uruguay Antidumping Agreement.

However, the problem with defining a nonmarket economy country became more important when new members joined the WTO, including transitional economies from East Europe and Asia.[219] As part of their commitments as newly acceded members to the WTO and based on the assumption that such transitional economies might cause market disruption, 'special provisions' were added to the protocols of accession for certain countries. Two specific trade remedy rules were designed to protect the producers of other members from the potentially adverse effects of Chinese dumping and subsidies. Section 15(a) and (d) has two fundamental consequences for China. First, it clearly provides that China will be treated as a nonmarket economy under Article VI of the GATT 1994, which implies that domestic costs and prices may be ignored completely if Chinese producers cannot prove that market economy conditions exist. Second, the treatment of China's nonmarket economy will be determined by market economy criteria established under the national law of the importing WTO members. This provision is also included in Vietnam's WTO accession protocol.

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[218] Ahn, Dukgeun, and Jieun Lee. "Countervailing Duty against China: Opening a Pandora's Box in the WTO System?" *Journal of International Economic Law* 14, no. 2 (2011): p. 353.
[219] Polouektov, op cit. p. 3.

The problem with section 15 of China's accession protocol is that it does not specify when and how the importing country should acknowledge China as a market economy. In Section 15(d), it does provide the termination date of the protocol and the conditions for early graduation from nonmarket economy provision. However, these clauses are insufficient to direct or even enforce WTO Members to grant market economy status to China over any time frame. Thus, although the nonmarket economy provision may expire, the continued application and administrative practice of special antidumping calculating methodologies are deemed to consistently burden Chinese exporters.

Therefore, a lack of multilateral definition of nonmarket economy concept has generated significant flexibility in generating diverse interpretations. In the history of multilateral trade negotiations, nonmarket economies are generally understood to be a deviation from a market economy structure and thus it has been considered 'inappropriate' to conduct a strict comparison using their domestic prices. Without any modification, the definition of a state-controlled economy became incorporated into Article 2.7 of the Uruguay Round Antidumping Agreement. Furthermore, in the EC-Fastener case, the Appellate Body upheld that the interpretative note to Article VI:1 GATT 1994 appears to describe a certain type of NME.[220] Since the interpretative note to Article VI:1 is the only provision that defines a nonmarket economy in the WTO, whether the Chinese economy falls under such conditions may create interpretational

[220] WTO, *European Union-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China,* WT/DS397/AB/R, para. 285, footnote 460.

challenges that should be based on both economic and political analysis. However, the definition of a nonmarket economy in the WTO is blunt, at best – this may have been self-explanatory during the Cold War period, but may not be applicable to present-day situations.[221] Unless a multilaterally agreed definition for a nonmarket economy is properly established, importing countries will continue to have wide discretion in determining which members are and are not nonmarket economy countries, and in granting market economy status.

4.2. Practicability of Market-Oriented Industry Test

Second, according to the case studies, the only mechanism to achieve market economy treatment available to Chinese producers under the United States' antidumping law is a task comparable to going through the eye of a needle. Commerce has been employing an industry-wide test to determine whether under the section 773(c)(1)(B), available information in the NME country permits the use of the market economy methodology for the NME-industry producing the subject merchandise.[222] Chinese producers have been applying the so-called "Market-Oriented Industry (MOI)

[221] Tietje and Nowort, op cit. p.10.

[222] Section 773(c)(1)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677b(c) provides that: (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a), "the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."

Test" since it was drafted in the *Amendment to Final Lug Nuts Determination*. However, the evidence shows that there is no case in which Chinese producers have successfully passed the criteria set out in the MOI test. Ever since the test was established, applications have been received each year from Chinese industries, yet after the case concerning the *preliminary determination of Certain Coated Paper Suitable for High-Quality Print Graphics from China*, they stopped completely. Thus, the impracticability of the MOI test calls into question its applicability and usability.

Table 3. Overview of China's Application to Market-Oriented Industry Test

Product	Industry	Initiation Date	Final Duty Order	Reasons for MOI Failure
Lug Nuts	Metals	1990.11	1991.9	Market Inputs
Carbon Steel Butt-Weld Pipe Fittings	Metals	1991.6	1992.7	Market Inputs
Sulfanilic Acid	Chemical	1991.10	1992.8	Market Inputs
Silicon Carbide	Chemical	1993.7	ITC Neg.	Market Inputs
Sebacic Acid	Chemical	1993.8	1994.7	Withdrawal
Saccharin	Chemical	1993.12	ITC Neg.	Representation
Crawfish Tail Meat	Agriculture	1996.10	1997.9	Representation
Certain Preserved Mushrooms	Agriculture	1998.2	1999.2	Representation, Pricing, Ownership, Market Inputs
Color Television Receivers	Metals	2003.5	2004.6	Representation, Ownership
Wooden Bedroom Furniture	Miscellaneous	2003.12	2005.1	Timing
Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses	Miscellaneous	2009.10	2010.11	Ownership, Market Inputs

In the *Amendment to Lug Nuts* case, the Commerce Department stated that the test for finding a market-oriented industry begins with a strong assumption that such

situations do not occur.[223] The presumption against finding a market-oriented industry must prevail unless thorough and convincing evidence is presented on the record which demonstrates that the producers operate in an environment of market-based costs and prices. Then, the questionnaire, which was sent through by the national ministry to these respondents, included an optional section on MOI. That section contained questions which parties must answer if they wish to make a MOI claim. It sought to determine: 1) whether the prices of other materials or non-material inputs are market-determined; 2) whether there is state-required production of the subject merchandise, and; 3) whether there is substantial state ownership in the industry. In practice, if the Commerce Department finds one of the factors to be unsatisfactory, the remaining analysis are deemed unnecessary and the MOI investigation is automatically terminated.

One of the reasons why the MOI test lacks applicability is because it has a high risk of success – it is an 'all or nothing test'. After the MOI test became applicable in practice, the most common reason why Chinese firms failed is because they did not satisfy the first criteria, which is to prove 'market-determined prices must be paid for all significant inputs.'[224] The requirement to prove market forces underlie the purchase of inputs and the scope of such inputs subject to investigation are determined on a case-by-case by the Commerce Department.[225] In *Final*

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[223] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).
[224] Ibid.
[225] In the *Amendment to Lug Nuts* case, the Commerce Department found that a significant

Determination of Sulfanilic Acid, the Commerce Department found that aniline is a significant material input used to produce sulfanilic acid and that aniline is a derivative of oil, which is a category-one product, centrally controlled at that time by the government of China.[226] Since the Commerce Department did not receive quantifiable data from the Chinese government which might have established the extent of state-required production for this input, they lacked the information necessary to evaluate whether or not aniline prices are market-determined.[227] The investigating authority reaffirmed that respondents claiming the absence of government control in purchases of input is not in itself sufficient to warrant a conclusion that the prices of inputs are market-driven.[228] Thus, to sufficiently show the degree of market orientation for a given industry, respondents must prove both the absence of governmental control and the existence of market forces in the purchase of inputs, providing documentary support. In addition, the requirement to prove that prices are market-determined applies for all significant inputs, whether material or non-material, and for all but an insignificant proportion of all the inputs accounting for the total value of the merchandise under the investigation. In *Preliminary Determination of Silicon Carbide*,

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input for producing chrome-plated lug nut, specifically steel is not purchased at a market determined price because of the extent of state-required production of that input and decided none of the respondents are eligible for market economy treatment. In *Final Determination of Carbon Steel Butt-Weld Pipe Fitting* case, the investigating authority determined that market prices were not paid for steel pipe significant input in the production of pipe fitting by any respondents and thus concluded that none of the respondents satisfy the MOI criteria.

[226] Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the People's Republic of China, 59 Fed. Reg. 29795, (1992).

[227] Ibid.

[228] Preliminary Determination of Sales at Less than Fair Value: Sulfanilic Acid from the People's Republic of China, 57 Fed. Reg. 9409, (1992).

the Commerce Department found that coal is a significant material input used to produce silicon carbide.[229] While the respondents stated that it was freely negotiated, the investigating authority drew upon a publicly available document from the World Bank to demonstrate that coal prices in China are not market-determined and that planned production is an important aspect of the Chinese coal industry.[230] Therefore, finding that at least one of the principal inputs for the production of silicon carbide is affected by state influence with regard to both its production level and its prices, is sufficient grounds to disqualify the respondents from the MOI test.

Second, the issue of representation significantly determines success in the MOI test. For example, in *Preliminary Determination of Saccharin*, two Chinese respondents from Shanghai KJ Import and Export Corporation and Suzhou Cereal Import and Export Corporations argued that they should be treated as a MOI. However, the Commerce Department found that their representation of the saccharin industry is inadequate to conclude the industry as a whole is market-oriented. Furthermore, according to the information provided by Chinese Ministry of Foreign Trade and Economic Cooperation (MOFTEC), a list of four exporters and six supplying manufacturers constitute the domestic manufacture and selling of saccharin.[231] Consequently, Commerce determined that there is no basis on which to conclude

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[229] Notice of Preliminary Determination of Sales at Less than Fair Value: Silicon Carbide from the People's Republic of China, 58 Fed. Reg. 64,549, (1993).
[230] *See* World Bank's January 1992 Discussion Paper on the "The Sectoral Foundations of China's Development", see also Preliminary Determination of Sulfanilic Carbide for Commerce Department on China's carbide industry.
[231] Preliminary Determination of Saccharin from People's Republic of China, 59 FR 120, (1994).

whether or not the production and sale practices of these two producers are representative of PRC saccharin producers as a whole. Furthermore, in Preliminary Determination of Crawfish Tail Meat, Commerce Department relied on Analysis of the Port Import/Export Reporting Services (PIERS) import data published by the Journal of Commerce to determine the constituency of the crawfish tail meat industry in China.[232] Based on their findings, crawfish tail meat was imported from several exporters who did not respond to the MOI questionnaire. Thus, Commerce terminated the MOI investigation due to insufficient information provided by respondents about the structure of the industry as a whole.[233] The MOI test requires information from all companies within the industry in question, and that all such companies must cooperate with the investigation so as to establish correctly whether an industry is market-oriented or not.

Lastly, Chinese producers face a huge administrative burden in proving this for all inputs. In the *Final Determination of Certain Preserved Mushrooms*, the respondents claimed that their industry was market-determined should met objective corroboration and scope of investigation should not be too narrowed.[234] During the investigation of the mushroom industry, the Department was concerned about the price

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[232] Preliminary Determination of Crawfish Tail Meat from People's Republic of China, 62 FR 58, (1997).

[233] Regarding the industrial coverage, the Commerce Department stated the following: "Even in those cases where the number of investigated firms is limited by the Department, a MOI allegation must cover all (or virtually all) of the producers in the industry in question." *See* Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat from the PRC, 62 FR 41347, 41353, (1997).

[234] Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from People's Republic of China, 63 FR 251, (1998).

of certain key inputs, such as the land and capital used to produce the merchandise. Since fresh mushrooms are the primary raw material used to make preserved mushrooms, the price of such inputs were deemed to be important in determining the costs and prices of the mushrooms.[235] However, the Commerce Department found that there was insufficient evidence to show that MOI conditions existed in the mushroom industry because of the following criteria: 1) there was no well-defined enforceable private property ownership rights, and 2) there was a fixed exchange rate system.[236] Generally, in the MOI test, the respondents must present thorough and convincing evidence to demonstrate that the producers operate in an environment of market-based costs and prices.[237] However, this far-reaching requirement, spanning all production inputs – such as land, labor and capital – makes it virtually impossible to show both an absence of governmental control and the existence of market forces.

In sum, the only mechanism for market economy treatment currently available to Chinese respondents in NME proceedings is practically impossible to pass. There is virtually no case in which Chinese producers have successfully received market economy treatment by satisfying the MOI criteria, and since the *Certain Coated Paper* case,[238] no other Chinese respondents have applied for the test. The reasons

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[235] Ibid.
[236] Ibid.
[237] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).
[238] Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less than Fair Value, 75 FR 59217, (2010).

behind such impracticability mainly come from the administrative burden put on the Chinese producers to prove both the absence of governmental control and the existence of market forces in their industry as a whole. This task has proven to be impossible in practice so far. Therefore, the possibility for Chinese producers to receive market treatment could be compared to trying to going through the eye of a needle, owing to the current United States' antidumping law and practice.

4.3. Questionable Results of the Separate Rate Test

As the last resort, Chinese exporters almost always apply to the separate rate test in order to avoid receiving an NME-wide rate calculated based on adverse facts.[239] However, in some cases even after Chinese respondents had passed the separate rate test, the end results were questionable. Beginning with the Sparkler case in 1990, the Commerce Department adopted a single rate test, in which it assigns a single rate in nonmarket economy country cases only if the applicant can demonstrate an absence of governmental control both in law and in fact, over its export activities in accordance with the separate rate test criteria.[240] Otherwise, the investigating authority begins with a rebuttable assumption that all companies within the country are subject to governmental control and assigns a single rate to all companies within the country

[239] NME-wide rate is calculated based on: 1) the highest margin state in the notice of initiation (i.e., the recalculated petition margin), or 2) the highest margin calculated for any respondent in this investigation, *See* Antidumping Manual, Separate Rate Certification, Exhibit USA-84, p. 3.
[240] Preliminary Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 55 Fed. Reg. 51,743 (1990).

known as the NME-wide rate.[241] In order to calculate a normal value for individual Chinese exporters, the Commerce Department adopts a two-tier approach: first the Chinese exporter must pass the separate rate test and, if they do so, the investigating authority generally constructs costs of production using price values from a market economy country. However, the manner in which the Commerce Department calculates the normal value after the exporter has passed the test and the design of the normal value calculating methodology questions the intrinsic benefits of passing the test.

First, under the present legislation, the Commerce Department can easily resort to a total reliance on surrogate country values instead of using the actual purchase price paid by the nonmarket economy manufacturer for items imported from a market economy country. Under the factors of production method, Commerce obtains verified factors of production – the quantity of inputs such as labor hours, the quantities of raw materials and the amount of energy consumed – incurred in producing the subject merchandise and the values in a market economy country deemed reasonably comparable to the nonmarket economy under investigation. The manner in which Commerce establishes the surrogate values will be chosen by order of preference: (1) with prices paid by the NME manufacturer for items imported from a market economy; (2) with prices in a primary surrogate country of domestically produced or imported materials; (3) with prices in one or more secondary surrogate

[241] Antidumping Manual, Separate Rate Certification, Exhibit USA-84, p. 2.

countries as reported by the industry producing subject merchandise in the secondary country or countries; (4) with prices in one or more secondary surrogate countries from sources other than the industry producing the subject merchandise.[242] Commerce normally evaluates the entire input using a weighted-average price of market economy purchases if the share of these purchases as a percentage of the total purchase volume of a particular input is more than 33 percent.[243] However, Commerce raised this threshold for the use of market economy purchase price to 85 percent.[244] The present provision stipulates that the market economy purchase price can only be used if "substantially all of the total volume of the factor is purchased from one or more market economy countries."[245] Since it became more difficult to use the actual purchase paid by NME manufacture from market economy countries, Commerce has little choice but to rely on information from a surrogate country. In other words, the problem of the surrogate country method that had long been criticized for producing seemingly unpredictable and arbitrary dumping margins is still deeply embedded in the factors of production method. Furthermore, the current practice of factors of production using surrogate values does not capture the price discrimination between national markets, which is the fundamental rationality of imposing antidumping duty.

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[242] Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 Fed. Reg. 20,589 (1991).
[243] ITA, Use of Market Economy Input Prices in Nonmarket Economy Proceedings, 78 FR 46799, August 2, 2013.
[244] 19 C.F.R. § 351.408(c)(1).
[245] Ibid.

Second, few cases show that Chinese respondents can still receive an NME-wide rate at the final antidumping duty order even though they are able to pass the separate rate test. For example in the *Preliminary Determination of Aluminum Extrusions from China*,[246] mandatory respondents, the Gung Ya Group and New Zhongya, as well as the 29 separate rate applicants, successfully verified the requisite information to demonstrate the absence of both *de jure* and *de facto* governmental control over their respective export activities.[247] However, the Department determined that the information to construct an accurate and reliable margin is not available on the record with respect to the Guang Ya Group and New Zhongya because of the following reasons: 1) they failed to provide such information in a timely manner or in the form or manner requested, 2) this significantly impeded the proceedings and 3) the provided information that could not be verified pursuant to rules on facts available.[248] As a result, even after the respondent has passed the separate rate test, should it fail to cooperate to the best of its ability pursuant to the section 776(b) of the Tariff Act, then

[246] Aluminum Extrusions From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, and Preliminary Determination of Targeted Dumping, 75 FR 69403, (2010).

[247] Section 776(a)(1) and 2(A), (B), (C) and (D) of the Tariff Act of 1930 provides basic rules for facts available.

[248] Specifically, Guang Ya Group's narrative questionnaire responses did not comport with the data sections of those same responses; moreover, the factors of production data submitted by Guang Ya Group post-verification did not reflect the data verified by the Department at Guang Ya Group's facilities. New Zhongya misreported a portion of its U.S. sales indicating that they were constructed export price sales to the first unaffiliated party in the United States when in fact they were the transfer price sales to its U.S. affiliated party. Finally, Xinya provided no documentation at verification to demonstrate its claimed ownership. For additional detail, *See* Guang Ya Group/New Zhongya/Xinya AFA Memo.

the authority may rely on adverse inference in reaching the necessary determination.[249] Such adverse inference means that information may be derived from a petition, a final determination in the investigation under this title, any previous review or determination, or any other information placed on the record.[250] In this case, the Guang Ya Group and New Zhongya received the equal weighted-average margin calculated for a PRC-wide entity, which is 33.28 percent.[251] Therefore, according to the rules on facts available, the investigating authority may apply adverse inference to respondents who fail to cooperate to the best of its ability, including those who eligible for the separate rate.

In conclusion, the Department's separate rate determination and its determination of the margin of dumping are two distinct processes. The process of the United States' antidumping calculating methodology against nonmarket economies is complex and administratively difficult to handle. The rules on the use of the surrogate country method and adverse inference are the most notorious examples that adversely affect final dumping margins.

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[249] 19 U.S.C. 1677d, Section 776(b) of the Tariff Act 1930 provides that: If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

[250] Ibid. Such adverse inference may include reliance on information derived from: (1) the petition, (2) a final determination in the investigation under this title, (3) any previous review under section 751 or determination under 753, or (4) any other information placed on the record.

[251] Antidumping Duty Order of Aluminum Extrusions from the People's Republic of China, 76 FR. 30650, (2011).

Chapter V. Conclusion

In sum, China's nonmarket economy status under the United States' antidumping law implies the following legal and administrative challenges. First, historically, the blunt definition of nonmarket economy country in the interpretative note to the GATT Article VI:1 has resulted in large administrative discretion to WTO members to determine nonmarket economy country in the first place and the manner in which nonmarket economy rule applies. Besides Section 15 of the WTO accession protocols of China and Vietnam, the interpretative note to the GATT Article VI:1 is the only definition of a nonmarket economy country in the frameworks regulating the international trading system. However, the two thresholds- 'a country which has a complete or substantially complete monopoly of its trade' and 'where all prices are fixed by the State' explain only partly what constitutes a nonmarket economy country. As a result, the interpretation of determinants of a nonmarket economy country and the methods for calculating normal value were left in hands of each WTO member. Second, the market-oriented industry test, which is the only mechanism established under US law to grant market economy treatment to China, proved to be impracticable. The channels that must be passed in order to secure market economy treatment is comparable to going through the eye of a needle. Chinese exporters must prove both

the absence of governmental control and the existence of market forces according to the criteria set forth in a market-oriented industry test – in no single case have they succeeded. In reality, therefore, China has no choice but to apply for a separate rate test and receive individually determined dumping margins under the umbrella of nonmarket economy treatment. Lastly, even after passing the separate rate test, a complex web of legal and administrative hurdles is placed before Chinese respondents. The rules on the use of the surrogate country method and adverse inference affects the determination of the normal value negatively. Therefore, seemingly unpredictable and arbitrary dumping margins can still be placed on those eligible for individually determined dumping margins. As a consequence, the benefit of graduating from nonmarket economy country may not be so great in light of the associated burdens.

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Appendix 1

1946 Suggested Charter for an International Trade Organization of the United States[252]

SECTION F. STATE TRADING

Article 26. Nondiscriminatory Administration of State-Trading Enterprise

1. If any Member establishes or maintains a state enterprise, wherever located, which imports, exports, purchases, sells, distributes or produces any product or service, or if any Member grants exclusive or special privileges, formally or in effect, to any enterprise to import, export, purchases, sell, distribute or product any product or service, the commerce of each of the other Members shall be accorded nondiscriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located, in respect to the purchase or sale by such enterprise of any product or service. To this end such enterprise shall, in making its external purchases or sales or any product or service, be influenced solely by commercial considerations, such as price, quality, marketability, transportation and terms of purchase or sale. The Member maintaining such state enterprise, or granting exclusive or special privileges to an enterprise, shall, upon the request of any other Member having an interest in the trade in the product or service concerned, or upon the request of the Organization, provide such specific and detailed information as will make possible a determination as to whether the operations of the enterprise are being conducted in accordance with the requirements of this paragraph.
2. For the purposes of this Article, a state enterprise shall be understood to be any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control.

Article 27. Expansion of Trade by State Monopolies of Individual Products

If any Member, other than a Member subject to the provision of Article 28, establishes, maintains or authorizes, formally or in effect, a complete or substantially complete monopoly of the importation or exportation of any product, such Member shall enter into negotiations with other Members, in the manner provided for in respect of tariffs under Article 18, with regard to *(a)* in the case of import monopoly, the maximum margin by which the price for an imported product charged by the monopoly in the home market may exceed the price at which such product is offered for sale to the

[252] Suggested Charter for an International Trade Organization of the United Nations (Department of State, September 1946).

monopoly by foreign suppliers, or *(b)* in the case of an export monopoly, the maximum margin by which the price for a product offered for sale by the monopoly to foreign purchasers may exceed the price for such product charged in the home market; after due allowance in either case for internal taxes and for transportation, distribution and other expenses incident to purchase, sale or further processing. Members newly establishing any monopoly in respect of an product shall not create a margin as defined above greater than the maximum rate of import duty (or, in the case of an export monopoly, greater than the maximum rate of export duty) which may have been negotiated in regard to that product pursuant to Article 18. With regard to any monopolized product in respect of which a maximum margin has been established pursuant to this Article, the monopoly shall, subject to the provisions of Section C of this Chapter, import and offer for sale (or, in the case of an export monopoly, offer for sale to foreign purchasers) such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product (or, in the case of an export monopoly, the full foreign demand for the product) at the prices charged under such maximum margins.

Article 28. Expansion of Trade by Complete State Monopolies of Import Trade

Any Member establishing or maintaining a complete or substantially complete monopoly of its import trade shall promote the expansion of its foreign trade with the other Members in consonance with the purposes of this Charter. To this end such Member shall negotiate with the other Members an arrangement under which, in conjunction with the granting of tariff concessions by such other Members, and in consideration of the other benefits of this Chapter, it shall undertake to import in the aggregate over a period products of the other Members valued at not less than an amount to be agreed upon. This purchase arrangement shall be subject to periodic adjustment

Appendix 2

15. Price Comparability in Determining Subsidies and Dumping[253]

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the Subsidies and Countervailing Measures (SCM) Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices and costs for the industry under investigation

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are any special difficulties in that application, the import WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Members should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

[253] WTO, *Accession of the People's Republic of China*, WT/L/432, adopted 23 November 2001.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.'

요약(국문초록)

미국의 대중국에 대한 비시장경제지위 적용 및 사례연구

중국은 WTO에 가입 당시 자국이 시장경제체제로 전환하는 과도기에 있음을 인정하고, WTO 회원국들이 반덤핑조사 과정에서 중국에 대하여 불리한 대우를 할 수 있도록 허용한 바 있다. 중국 가입의정서에는 WTO 회원국이 중국의 가격을 인정하지 않고, 대체국의 가격에 의해 정상가격을 구성하도록 허용하고 있어 중국에 매우 불리한 상황이다. WTO 반덤핑협정상에서는 비시장경제지위에 대한 개념 정의가 한정적이라 일부 WTO 회원국들은 자국의 반덤핑법상 비시장경제국에 대한 해석 및 자체적 규정을 적용하고 있다. 따라서 비시장경제 제도에 관한 국가별 연구와 WTO 합치성에 관한 문제가 중요한 이슈로 대두되고 있다.

비시장경제지위 부여에 대한 법적 의미와 해석은 기존의 다양한 연구에 의해 논의되어져 왔다. 특히 많은 연구가 반덤핑협정 또는 WTO 회원국의 반덤핑법상의 비시장경제 개념의 기원과 발전 과정에 초점을 두고 있다. 본 연구는 기존의 방향과 달리 비시장경제국에 반덤핑규정을 적용할 때 초래되는 법적 또는 행정적 문제를 분석하는데 의미를 두고 있다. 이를 위해 본 논문은 서론에서 WTO 체제에서

비시장경제에 대한 개념을 역사적으로 살펴보고, 비시장경제규정이 가장 발전된 미국의 제도를 분석하여 현행법상 중국에 비시장경제지위를 적용하는 것이 가지는 의미를 확인하고자 한다. 이를 위해 본 논문은 1980 년도부터 2016 년간 미국이 대중국에 실시한 반덤핑 조사 사례를 인용하고 있다.

WTO 체제에서는 비시장경제지위를 따로 구분하고 있지만, 반대로 시장경제지위에 대한 규정은 존재하지 않아 앞으로 중국과 같은 체제전환국이 WTO 에서 어떤 지위를 가질 것에 대한 논란이 향후에도 지속될 것으로 여겨진다. 따라서 국가별 비시장경제 규제를 이해하고 이들을 어떻게 국제무역규제에 합치시킬 것인가에 대한 연구가 앞으로 좀 더 논의되어야 할 것이다.

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